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No. 58569

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellee,)	COOK COUNTY
)	
v.)	
)	
LORENZO COLLIER, otherwise called	)	HONORABLE
JAMES HARRIS,	)	KENNETH R. WENDT
	)	PRESIDING
Defendant-Appellant.)	

PER CURIAM* (First District, Fifth Division):

After a bench trial defendant was found guilty of the offense of unlawful use of a weapon in violation of Section 24-1(a)(7) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a)(7)) and sentenced to not less than one and one-half years nor more than four and one-half years.

The sole issue on appeal is whether the evidence was sufficient to establish beyond a reasonable doubt that the defendant was in possession of the shotgun.

Police officer Plovanich testified for the State that he and five other uniformed policemen, without a warrant, entered an unrented apartment in a building at 336 West Schiller, after obtaining a key from the manager of the building. Plovanich went into the bedroom (immediately to the left of the entrance) and observed the defendant and three other people sitting on the bed. Three of the four, including the defendant, had hypodermic needles in their arms. No one was seated to the left of the defendant but one person was seated about two feet away to his right, another was seated at the bottom of the bed and a third was on the other side of the bed.

Plovanich observed a few inches of the barrel of a sawed-off shotgun protruding from underneath the bed between the defendant's feet. He ordered all the individuals to stand and put their hands up and he then "recovered" the shotgun which had a shell in the chamber and two in the clip.

*Justice English did not participate.



NO. 10204

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INVESTIGATION OF THE CHICAGO BAR ASSOCIATION

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Plovanich identified defendant as the person between whose feet he saw the barrel of the shotgun.

Defendant testified that he arrived with a young lady at the Schiller Street apartment, which was known as a "Shooting Gallery"; there were five or six people in the apartment. Subsequently, about seven or eight police officers kicked down the door, took all of the occupants into another room, searched the apartment and found the shotgun under the bed. He had never seen the gun before and it was not his gun.

On cross-examination, defendant testified that he was sitting on the bed "shooting heroin", when the police entered and, after the police took him into the front room, he could not look into the bedroom because the curtains were drawn.

Defendant argues that the evidence was insufficient to establish beyond a reasonable doubt that he was in possession of the shotgun; that the evidence fails to establish that he had immediate and exclusive control over the area in which the shotgun was found; that the evidence fails to establish that he knew the shotgun was lying on the floor underneath the bed; and that, therefore, the evidence was insufficient to prove him guilty of the unlawful use of a weapon.

We disagree with these contentions. At the trial, there was ample circumstantial evidence presented to warrant the trial court's inference of defendant's knowledge and constructive possession of the shotgun. A person is in constructive possession of contraband when such is in a place under his exclusive and immediate control (People v. Bedford, 78 Ill.App.2d 308, 223 N.E.2d 290.) The arresting officer found the shotgun under the bed where defendant was seated with a portion of the gun extended between the defendant's feet. The fact that other persons were sitting on the bed does not negate the trial court's finding of defendant's control and constructive possession of the shotgun as the person nearest to defendant was about two feet from him.

In People v. McKnight, 39 Ill.2d 577, 237 N.E.2d 488, the court held that while it is unnecessary to prove defendant's ownership, it is essential that defendant have knowledge of the presence of the gun which may and often must be proved by circumstantial evidence. Other cases to the same effect are People v. Williams, 132 Ill.App.2d 806, 270 N.E.2d 144, and People v. Bell, 7 Ill.App.3d 625, 288 N.E.2d 253.

In a bench trial it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. People v. Bracey, 129 Ill.App.2d 57, 262 N.E.2d 748; People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378. Here, the trial court found "that the officer saw two or three inches of that [the barrel of the shotgun] sticking out from under the bed, between his [defendant's] feet"; that "he had it [the shotgun] because he had the main control, * * * immediate vicinity, between his feet under the bed"; and that "from the testimony of this officer nobody could have gotten that gun, but this man".

The trial court was in the best position to observe the demeanor of the witnesses during the trial and found the defendant guilty of the offense of the unlawful use of a weapon. We believe the evidence was adequate to support the judgment. The shotgun was sufficiently accessible, lying on the floor between the defendant's feet, to be considered in his constructive possession and was circumstantial evidence that he had knowledge of the presence of the shotgun. (People v. Bell, 7 Ill.App.3d 625, 627, 288 N.E.2d 253.) Under such circumstances, we believe that knowledge of the gun's presence was sufficiently proven.

The numerous cases cited by the defendant set forth general principles of law, but are inapposite to the facts in the case at bar.

58569

For the reasons stated, the judgment is affirmed.

Affirmed.

(Publish abstract only.)



58676

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
EUGENE BETTS,	)	HONORABLE
	)	MAURICE POMPEY,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendant was found guilty after a bench trial of the offense of theft. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).) He was sentenced to one year to be served concurrently with a previously imposed sentence in another state.

Defendant appeals, arguing that the complaint filed against him charging theft was fatally defective, and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial the following evidence was adduced: John E. Markham, an investigator for the Markham Police Department, testified as a witness for the State that the defendant was arrested in Ohio with one Sidney Hardaman.

Alex Starks as a witness for the State testified that he runs a restaurant at 232 West Root Street, Chicago, Illinois. On September 16, 1971, at approximately 11:30 A.M., the defendant and two other men came into the restaurant. After remaining in the restaurant for approximately five to six minutes, all three men pulled guns and announced a hold-up. The men forced Starks' wife and another employee to lie on the floor while Starks was told to get the money from the cash register. Starks put the money into a paper bag and handed it to the three men. The men left through the front door with guns in their hands. The entire robbery took a total of three to four minutes. All three men had

* Judge English did not participate.

been in the restaurant on previous occasions. Starks followed the men out of the restaurant and was able to get the license number of their car.

Sidney Hardaman as a witness for defendant testified that he had entered a plea of guilty to the theft of Starks' restaurant on September 16, 1971. He testified that the defendant was not with him during that hold-up. He refused to state who was with him during the hold-up.

Earlene Betts, the defendant's mother, a witness for defendant, testified that she does not know where her son was on September 16, 1971, but that he was supposed to be in the Navy, stationed in Florida.

Defendant testified that on September 16, 1971, he was in the United States Navy, stationed at Jacksonville, Florida. He left the station on September 19, 1971. He left the Navy on August 1, but they had caught up with him in Miami, Florida, on August 10, and he did 30 days in the brig. He had known Hardaman for approximately seven years.

Opinion

Defendant's first argument is that the complaint filed against him is fatally defective because it failed to allege the requisite mental state. Defendant urges that the failure to include the word "knowingly" in the complaint charging him with theft renders the complaint fatally defective. The complaint filed against defendant charged that he committed the offense of theft:

"In that he obtained unauthorized control over property, United States currency, of the value of less than \$150 the property of the victim, Alex Starks, intending to deprive the said Alex Starks permanently of the use and benefit of said property in violation of chapter 38, section 16-1(a)(1), Illinois Revised Statutes."

The exact argument defendant now seeks to make has been recently rejected by this court. (People v. Ramos, et al., ____ Ill. App. 3d ____, ____ N.E.2d ____, First District No. 58215, decided September 25, 1973); People v. Reese and Jones, 11 Ill. App. 3d 817, 298 N.E.2d 315; People v. Wilson, 10 Ill. App. 3d 48, 294 N.E.2d 1; People v. Geary, 8 Ill. App. 3d 633, 291 N.E.2d 13.) In the case at bar the complaint was sufficient.

Defendant's second argument is that the evidence is insufficient to establish his guilt beyond a reasonable doubt because the identification testimony of Starks was insufficient. In Illinois the rule is well settled that in a bench trial the credibility of witnesses is for the trial judge to determine. People v. Wright, 3 Ill. App. 3d 262, 278 N.E.2d 175. The testimony of one witness, if positive and credible, is sufficient to sustain a conviction even though contradicted by the accused. People v. Bonds, 132 Ill. App. 2d 827, 270 N.E.2d 575. The decision of the trier of fact as to credibility of witnesses will not be disturbed unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. (People v. Catlett, 48 Ill. 2d 56, 268 N.E.2d 378; People v. Daugherty, 1 Ill. App. 3d 290, 274 N.E.2d 109.)

In the case at bar the testimony of Starks was positive and credible. He stated that he was able to observe the defendant, whom he had seen in the restaurant on prior occasions, for several minutes during the robbery under adequate lighting conditions. Starks had a sufficient period of time under adequate lighting conditions to identify the defendant. After a complete review of the record, we find the guilt of defendant was established beyond a reasonable doubt.

Defendant also argues that his alibi testimony should not have been disregarded by the trial judge. A trial judge is not

obliged to believe the defendant's alibi testimony. (People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462; People v. Pierre, 114 Ill. App. 2d 283, 252 N.E.2d 706.) Here the trial judge found that the defendant was the perpetrator of the crime charged, and after a complete review of the record, we cannot say that the alibi testimony raised a reasonable doubt of defendant's guilt.

The judgment is affirmed.

AFFIRMED.

ABSTRACT ONLY.

No. 59342

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
v.)	_____
)	
LANCE NORRIS,	)	HONORABLE
	)	FRANCIS T. DELANEY
Defendant-Appellant.	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

The Public Defender of Cook County has moved for leave to withdraw as appellate counsel on the ground that the appeal is without merit and could not be successful. The motion is supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, wherein appellate counsel advances as the sole issue which could be raised on appeal, which he states is without merit, the question of whether the trial court's findings made as to certain questions, posited by this Court on remand to the trial court after a previous appeal in this case, were so erroneous as to warrant reversal. It appears that copies of the motion and the brief were forwarded to Lance Norris (defendant) on October 17, 1973, and although he was allowed time until December 16, 1973, to file any points he desired in support of the appeal, he had not responded as of December 20, 1973.

A five-count indictment was returned against defendant charging him with three offenses of armed robbery and two offenses of attempt murder, in violation of sections 18-2 and 8-4, respectively, of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, pars. 18-2, 8-4). He was found guilty by a jury on the three armed robbery counts and was sentenced to a term of ten years to seventeen years; the trial court directed a verdict for defendant on the two attempt murder counts at the close of the State's case.

The conviction was thereafter appealed to this Court on a question involving the refusal by the State to furnish certain

* Justice English did not participate.

police reports to defendant upon the latter's demand. This Court vacated the judgment on November 22, 1972, and remanded the cause to the trial court with the following directions:

"[T]hat the court hold an in camera examination of the police reports in question. During this examination the court shall determine: (1) whether any of the reports contains substantially verbatim statements; (2) if so, whether the statements were impeaching in character; and (3) if so, whether the failure to produce said statement(s), in light of the other evidence presented against the defendant, was not harmless error beyond a reasonable doubt. If the answer to any of the above questions is 'no', the court should make a specific finding of fact to that effect and re-enter the judgment of conviction. If the answers to all of the questions are 'yes', the cause should be set for a new trial."

(See People v. Norris,
8 Ill.App.3d 931, 291 N.E.2d 184.)

On remand to the trial court, a hearing was held in camera on March 12, 1973, at which the assistant State's attorney and defense counsel, defendant not being present, advanced arguments based upon the contents of the police reports in question, which had been submitted to the trial court for its examination. The trial court, after noting that the contents of the reports were composites of statements made to police officers by the three prosecuting witnesses, found, inter alia, that the only matters of impeaching value contained in the reports were minor discrepancies as to defendant's age, height and weight, and the color of his hair, which at one time had been dyed red. On March 30, 1973, the trial court entered the following findings and orders, nunc pro tunc as of March 12, 1973, from which the instant appeal is taken:

"That, as a matter of fact, the reports presented to this Court, in camera, did not contain any substantially verbatim statements, but were composite reports by different police officers; and

The Court Further Finds that the statements were not impeaching in any character, even though on the date of his surrender, there was a difference of one year in age, one inch in height, and twelve pounds in weight, and there was a statement made by somebody that his hair was dyed red; and

The Court Further Finds the failure to produce these statements, which are composite and would not allow the defense attorney to cross-examine any of these prosecuting witnesses as individuals in the light of these statements, that there was such evidence presented by the witnesses themselves, and that the failure to produce this statement was harmless error beyond a reasonable doubt; and this Court having held the in camera examination and having answered the three (3) specific questions put to it by the Appellate Court in the negative;

IT IS THEREFORE ORDERED that the answer to any and all questions is 'No' and the Court having made a specific finding of fact to that effect as aforestated;

IT IS FURTHER ORDERED that the judgment of conviction heretofore entered under Indictment No. 70-355 be and is hereby re-entered and that the sentence heretofore entered under Indictment No. 70-355 be and is hereby re-entered and that this defendant is re-sentenced to the Department of Corrections to a term of not less than ten (10) years, nor more than seventeen (17) years."

After our review of the police reports submitted to the trial court in this matter, we agree that the contents of those reports do not constitute "substantially verbatim statements" of the prosecuting witnesses to the police officers and that they are not impeaching, except for the minor matters mentioned by the trial court. In light of the other evidence in the case, the refusal by the State to produce those reports at trial was harmless error beyond a reasonable doubt. We are in further agreement with appellate counsel that the trial court did not commit reversible error in arriving at those findings.

The only other matters which could possibly be raised on appeal which we have found upon independent review of the record in accordance with the Anders requirements relate to a statement in the police reports that one or more of the prosecuting witnesses had allegedly observed the defendant on television after he had surrendered himself to the police; and the fact that defendant had not been physically present at the trial court hearing on the questions posited by this Court.

As to the question of the prosecuting witnesses allegedly having seen the defendant on television, the police reports further disclose that, prior to the date on which the defendant allegedly appeared on television, the witnesses had picked out his photograph from a series of photos shown them. Raising such a point at trial would therefore have been of little value for impeachment purposes.

As to the question of whether defendant had a right to be present at the hearing on the matters posited by this Court on remand, it is well established that although a defendant has a right under the Fourteenth Amendment to be present at all stages of the proceedings against him, that right is not infringed where the hearing does not involve his substantial rights as we believe it did not in this case. People v. Hudson, 46 Ill.2d 177, 263 N.E.2d 473; People v. Longstreet, 2 Ill.App.3d 556, 276 N.E.2d 825.

After an independent review of the record in accordance with the dictates of Anders, we concur in the opinion of the Public Defender that the points raised are not arguable on their merits and an appeal is wholly frivolous. Neither have we found any additional grounds which could support an appeal.

Therefore, the Public Defender is granted leave to withdraw as counsel for defendant on appeal and the judgment of that court is affirmed.

Motion allowed.

Judgment affirmed.

(Publish abstract only.)

58762

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
JIMMIE WILSON,	)	Hon. Daniel J. White,
	)	Presiding.
Defendant-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Defendant, Jimmie Wilson, was charged with criminal damage to property in that on November 12, 1971, at 7335 South Coles in Chicago he "knowingly damaged the rear door, the property of Katherine C. Kenyon" without her consent, in violation of Ill. Rev. Stat. 1971, ch. 38, par. 21-1(a). Following a bench trial, he was convicted and sentenced to four months in the House of Correction. On appeal, defendant maintains the State failed to prove ownership of the property as charged in the complaint because it did not prove ownership of the building damaged.

Katherine C. Kenyon, called by the People, testified that at approximately 1:30 in the afternoon of November 12, 1971, she was watching television in her home at 7335 Coles when she heard a noise at the back door and "went back". She could see through a part of the shade and immediately called the police. After the police arrived, she noticed the wood on the door was "broken off, torn off", and part of the frame of the door had been "tried". The last time she looked at the door, the day before, there was nothing wrong with it. At no time did she give consent to anyone to damage her door.

Chicago Police Officer Brady, called by the People, testified that on November 20, 1971 [sic], he went to 7335 South Coles

*Mr. Presiding Justice Edward J. Egan did not participate.

at approximately 1:50 P. M., third floor, in response to a "prowler call". On his way through the gangway, he heard noises coming from the third floor. He saw the defendant and another male Negro attempting to pry the door open. Defendant was holding the door with his two hands inside the door and the other man had a screwdriver in his hand. He then heard a noise in the gangway, which turned out to be garbagemen, and then he started back up the stairs. The two men tried to run past him but he stopped them and placed them under arrest. A large chunk of wood was out of the door and the screen was partially torn.

The defendant, Jimmie Wilson, testified that he and the other man, his brother, Joseph Jackson, were on their way to a friend's house and for no particular reason happened to stop at 7335 Coles "to drink". He stated that they were arrested on the porch on the first floor about four or five steps down, as they were coming from the first floor where they had been putting wine bottles in a garbage can.

Defendant relies mainly on People v. Mosby (1962), 345 Ill. 2d 400, 185 N. E. 2d 152, where the court held that ownership, an essential element in a burglary indictment, was not proven. Mosby was clarified, however, in the subsequent case of People v. McCracken (1964), 30 Ill. 2d 425, 431-432, 197 N. E. 2d 35, where the court affirmed a burglary conviction where the evidence showed the complainant proved he was "the occupant of, and made his home" in the apartment in question. Similarly, in People v. Apple (1968), 91 Ill. App. 2d 269, 271-272, 233 N. E. 2d 440, the court stated:

"Dixie Hill testified that she lived at the address described in the indictment and occupied apartment 2. ***.

* * *

"*** [I]t is established that the apartment attempted to be entered by the defendant was the apartment of another, and proof of ownership of the apartment building was unnecessary. There is, in this case, proof of occupancy and possession. Certainly, the right to possession and occupancy in another was shown as against the defendant. We take it to be settled that that is all that is required."

The evidence here was sufficient that lawful possession was in the complainant and proof of ownership of the building was not required.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Abstract Only.



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PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT COURT
) OF COOK COUNTY.
)
vs.)
)
HERMAN DOSS,) HONORABLE IRWIN COHEN,
) Presiding.
)
Defendant-Appellant.)

PER CURIAM:*

Herman Doss, defendant, was found guilty after a bench trial of the offense of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). He was sentenced to a term of six months in the House of Correction. On appeal, defendant argues that the complaint charging him with theft is fatally defective in that it fails to allege venue and that he was not proven guilty beyond a reasonable doubt.

At trial, the following evidence was adduced: Robert Moore testified that he was employed as a cab driver for Yellow Cab Company. On September 7, 1972, at approximately 4:45 P.M., he was dropping off a passenger at 1209 S. Racine, Chicago, Illinois, when defendant came up to his cab. Defendant announced a robbery and pointed a sack at Moore, stating that there was a pistol inside. Defendant took \$20 from Mr. Moore's wallet. Moore testified that he got a clear look at defendant's face while defendant was pointing the sack at him and standing to his left for approximately two minutes.

Chicago Police Investigator Munyon testified that on September 8, 1972, at approximately 4:00 P.M., he placed defendant under arrest at 1209 S. Racine. Defendant was transported to the Maxwell Street Police Station where he was informed of his constitutional rights. Defendant was asked if he had stuck-up a man yesterday with a paper bag and a gun and replied, "I didn't have a gun. I just had my hand in the paper bag."

Herman Doss, defendant, testified that on September 7, 1972, he was in the vicinity of 1209 S. Racine and observed the complaining witness driving his cab. He denied ever having a bag or robbing the complainant. He also denied ever telling Investigator Munyon that he had been involved in a robbery.

Defendant's first argument on appeal is that the complaint charging him with theft is fatally defective in that it fails to allege venue. Defendant bases his argument on the fact that the body of the complaint alleged that the crime occurred at 1209 S. Racine, but did not state the city or county in which the crime had allegedly been committed.

In People v. Williams, 37 Ill.2d 521, 229 N.E.2d 495, defendant appealed his conviction for unlawful use of weapons, arguing that the complaint was void because the body of the complaint did not allege the county in which the offense had been committed. The body of the complaint stated the street address where the crime occurred but did not state the city or county. The Supreme Court rejected defendant's contention based upon the fact that the title of the complaint read, "State of Illinois, County of Cook" and "The Circuit Court of Cook County." The court held that the caption of the indictment must be read as part of the complaint and when so read, the complaint sufficiently designates the county in which the offense was alleged to have been committed.

Defendant now seeks to distinguish the Williams case on the basis that in Williams the complaint was not challenged in the trial court, while in the case at bar, the validity of the complaint was challenged in defendant's motion for a directed verdict. Here, defense counsel made a motion for a directed verdict based upon three arguments. First, that the State did not prove venue by the testimony of either of the State's witnesses; second, that the complaint was vague for failing to state the amount of property stolen; and third, that the complaint was inadequate in that it did not

allege that property of a value of less than \$150 was stolen. None of these allegations challenges the complaint as failing to state venue. However, even if defendant's argument was to be accepted, it is without merit.

In People v. Adams, 109 Ill.App.2d 385, 248 N.E.2d 748, defendant was convicted after a bench trial of prostitution, battery and resisting arrest. On appeal, defendant argued that the complaints filed against him were fatally defective because the body of the complaints failed to allege the county in which the offense was committed. Defendant first challenged the validity of the complaints in the trial court by making a written motion in arrest of judgment. In rejecting defendant's contention, this court relied upon Williams and held that the caption and body of the complaint must be read as a whole and when so read, the complaint sufficiently designated the county in which the offense had been committed.

In the case at bar, defendant in his reply brief concedes that venue was proven in the trial court. The captions of the complaint were not inconsistent with the body of the complaint and defendant's testimony revealed that he was fully aware of the location of the crime and in fact lived at that address. The caption of the complaint clearly stated "County of Cook" and "The Circuit Court of Cook County." The complaint, when read as a whole, sufficiently designates the county in which the offense was allegedly committed.

Defendant's second contention on appeal is that he was not proven guilty beyond a reasonable doubt because the identification testimony by the complaining witness was insufficient. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt will the finding of the trial court be disturbed. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Pointer, 6 Ill.App.3d 113, 285 N.E.2d 171. The uncorroborated

identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible, even though contradicted by the defendant. People v. McVet, 7 Ill.App.3d 381, 287 N.E.2d 479.

In the case at bar, the testimony of Moore was positive and credible. He testified that during the hold-up, which took approximately three and one-half minutes, he was able to observe defendant's face from close proximity for approximately two minutes. The trial judge determined that Moore had a sufficient opportunity under adequate lighting to identify defendant. After a complete review of the record, we cannot say that determination was erroneous. People v. Gaiter, 8 Ill.App.3d 784, 291 N.E.2d 172.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

*FIRST DISTRICT - SECOND DIVISION
HAYES, P.J., did not participate.

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THE BUCKINGHAM CORPORATION,)
a Delaware corporation,)
Plaintiff-Appellee,)
)
) Appeal from the Circuit
v.)
) Court of Cook County.
)
GEORGE J. VASELOPULOS, individually)
and DBA BEL-PARK LIQUORS,)
) Walter P. Dahl, J.
Defendant-Appellant.)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The complaint in this case charged George Vaselopulos, a retailer of alcoholic beverages, with violating the fair trade contract (Ill.Rev.Stat., 1971, ch. 121-1/2, paras. 188-191) of the Buckingham Corporation, the national distributor of Cutty Sark Whisky.

The complaint, which requested injunctive relief, and its subsequent amendment alleged that the defendant had sold and advertised Buckingham's product at prices below those stipulated in the fair trade agreement. The defendant, who had not signed the agreement, filed a verified answer denying the allegation. Although no hearing was held on the complaint and answer, a temporary injunction was issued on January 18, 1972. Five successive orders extended the injunction until March 10, 1972. No further extension was granted and the injunction expired on that day. However, on the day before, March 9, 1972, the defendant had filed a notice of interlocutory appeal.

While the appeal was pending, the plaintiff amended its complaint, a hearing was held and, on May 18, 1972, another temporary injunction was issued. The defendant was restrained from willfully

and knowingly advertising, offering for sale or selling Cutty Sark Whisky for less than the prices stipulated by Buckingham. The defendant again appealed, and this second appeal is the one with which we are presently concerned.

Of the seven issues presented for review, at least one requires reversal: the evidence did not sustain the allegation in the complaint that the defendant willfully and knowingly advertised the plaintiff's product below the stipulated prices. This allegation was made by Buckingham in three other cases involving different retailers. The evidentiary hearings were held simultaneously in each case and the plaintiff offered the same evidence to prove its allegations.

The evidence is detailed in Buckingham v. Caravan Liquors, Inc., (1973), Ill.App.3d , N.E.2d (No. 57797, filed December 13, 1973) and summarized in Buckingham v. Foremost Sales Promotions, Inc., (1973), Ill.App.3d , N.E.2d (No. 57795, filed December 27, 1973). We will not repeat it here. In both opinions this court held that Buckingham failed to prove that the defendant had notice of the plaintiff's fair trade prices.

We reach the same conclusion in this case. The evidence was insufficient to prove that the defendant knowingly violated the fair trade agreement. The injunctive order will, therefore, be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

McNamara, P.J., and McGloon, J., concur.

57339

THE BUCKINGHAM CORPORATION,
a Delaware Corporation,

Plaintiff-Appellee,

v.

FOREMOST SALES PROMOTIONS, INC.,
an Illinois Corporation,

Defendant-Appellant.



Appeal from the Circuit
Court of Cook County.

57340

THE BUCKINGHAM CORPORATION,
a Delaware Corporation,

Plaintiff-Appellee,

v.

GEORGE J. VASELOPULOS, Individually
and DBA BEL-PARK LIQUORS,

Defendant-Appellant.

Walter P. Dahl, J.

57341

THE BUCKINGHAM CORPORATION,
a Delaware Corporation,

Plaintiff-Appellee,

v.

CARAVAN LIQUORS, INC.,
an Illinois Corporation,

Defendant-Appellant.)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

These cases concern alleged violations of contracts drawn in
accordance with the Fair Trade Act of this State. Ill.Rev.Stat., 1969,
ch.121-1/2, para. 188, et seq. The contracts provided that the defendants,

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Chicago retailers of alcoholic beverages, would not sell, advertise or offer for sale a Scotch whisky carrying the brand name Cutty Sark, for less than the price designated by the Buckingham Corporation, the national distributor of the whisky. In each case, Buckingham filed a complaint for injunction which charged the defendant with either selling the whisky or advertising it for sale, below the price stipulated by Buckingham. Attached to the complaints were an example of a fair trade agreement between Buckingham and an Illinois retailer, a letter sent by Buckingham in December, 1969, to retailers which stated the minimum fair trade prices of Cutty Sark, and either the advertisement or the purchaser's report of the sale, as the case might be.

The defendants answered the complaints. The defendants charged with the sales denied making them; the one charged with the advertising denied receiving notice of the fair trade agreement or of the fixed prices. Buckingham filed motions for temporary injunctions. The motions were granted on January 18, 1972, and a "Temporary Injunction Order" was entered in each case.

The injunctions were effective to January 24th. On the 24th, orders were entered which extended them to February 3rd. On February 3rd, there was an extension to February 8th. On February 8th, there was a further extension to February 24th. On February 24th, the cases were again continued, this time to March 10, 1972.

On March 9, 1972, the defendants appealed from the order of January 18th and the four subsequent orders. The notices of appeal requested that all the orders be reversed and the cases remanded for

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trial in accordance with the instructions of this court. Two issues — common to the three appeals — are these: evidentiary hearings should have been held before the temporary injunctions were issued, and the injunctive orders were not sufficiently specific.

The plaintiff-appellee's answering briefs ignore these issues. In each case two affirmative contentions are advanced to defeat the appeals: (1) the orders of January 18th were not injunctions but temporary restraining orders and, as such, cannot be appealed; (2) the orders expired by their own terms on March 10, 1972, hence the issues raised by the defendants are moot.

In a companion case (Buckingham v. Vesolowski (1974), 111. App.3d , N.E.2d [No. 57338, filed January 10, 1974]) the same affirmative contentions were advanced. In Vesolowski we rejected the plaintiff's first contention, but agreed with the second — that the case was moot. We stated the reasons for our decision and dismissed the appeal. It is unnecessary to repeat the reasons here. The court history of the Vesolowski case and the present ones is the same and the basic issues are identical. For the reasons stated in Vesolowski, we find these appeals are moot and they will be dismissed.

Appeals dismissed.

McNamara, P.J., and McGloon, J., concur.

No. 57618



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
SAMUEL COOK,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Samuel Cook, defendant, entered a plea of guilty on May 11, 1971, to an indictment charging him with unlawful possession of a narcotic drug in violation of section 22-3 of the Criminal Code (Ill.Rev.Stat. 1969, ch.38, par.22-3.) He was placed on probation for a period of three years with the condition that he attend the Drug Abuse Program. On February 25, 1972, a rule to show cause why defendant's probation should not be terminated, based upon his failure to report to the probation officer, was filed.

On April 5, 1972, a hearing was held on the rule to show cause. Adult probation officer, Mel Williams, testified that after being placed on probation, defendant never reported to the probation office and all attempts to locate him were unsuccessful.

Samuel Cook, defendant, testified that other than the first day upon which he was placed on probation, he never reported to the adult probation officer. Defendant stated that his reason for not reporting was that he was afraid of going back to jail. Defendant also admitted that after being placed on probation he did not at any time attend the Drug Abuse Program.

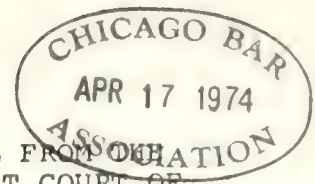
Defendant's only argument on appeal is that his sentence is excessive and should be reduced. While this court has the

authority to reduce a sentence, the Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection. (People v. Taylor, 33 Ill. 2d 417, 211 N.E.2d 673.) The imposition of sentences is within the discretion of the trial court and courts of review will not interfere with that discretion unless it is manifest in the record that the sentence is excessive and not justified. (People v. Keene, 1 Ill.App.3d 720, 274 N.E.2d 130.) In the case at bar, defendant had had two prior convictions at the time he was initially placed on probation for possession of a narcotic drug. After being placed on probation, defendant failed to report to the probation office as required by the terms of his probation and all attempts to locate him were unsuccessful. Defendant also failed to attend the Drug Abuse Program as required by the terms of his probation. These were clearly sufficient grounds for revocation of defendant's probation. The sentence imposed upon the defendant was the minimum possible penitentiary sentence of one year with a maximum of three times the minimum. Under these circumstances, we are of the opinion that the sentence imposed upon the defendant is not excessive.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.



No. 57985

FREDDIE HILL,

Plaintiff-Appellant,)

vs.)

CHICAGO HOUSING AUTHORITY, a
municipal corporation,)

Defendant-Appellee.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
BEN SCHWARTZ,
PRESIDING.

PER CURIAM:

On November 13, 1970, plaintiff, Freddie Hill, brought this action for declaratory judgment against the defendant, Chicago Housing Authority, to enforce the terms of a settlement agreement allegedly entered into between the plaintiff and the defendant, through its attorney of record, Jay Canel, on August 11, 1970. The trial court granted defendant's motion for summary judgment and plaintiff brought this appeal. The only issue is whether the settlement agreement of August 11, 1970, is valid and enforceable.

Plaintiff's complaint alleged he had brought suit against the C.H.A. for injuries sustained on May 18, 1963, when he lost the sight of one eye due to being struck by a fragment of glass, allegedly as a result of negligent maintenance on the part of the C.H.A. Jay Canel of the law firm of Canel & Canel entered an appearance and answer on behalf of the C.H.A. and the case was assigned to trial before the Honorable Ezra Clark on August 10, 1969. On August 11, 1970, Canel offered plaintiff \$30,000 in full, final and complete settlement, which plaintiff accepted, executing a release the same day. Pursuant to the settlement agreement, an order of dismissal was entered August 11, 1970. Sometime subsequently, C.H.A. refused to make payment as provided in the settlement agreement and plaintiff brought this action for declaratory judgment to determine the force and effect of the settlement agreement and to enforce its terms against the C.H.A.

Both parties filed motions for summary judgment accompanied by affidavits.

An affidavit of C.E. Humphrey, executive director of the C.H.A., stated: Defense of the case was referred to Fidelity General Insurance Company, which insured C.H.A. against liability under policy CL19148. Fidelity hired Canel & Canel to represent C.H.A. and under the terms of the contract of hire, the attorneys were to represent C.H.A., but were to receive compensation for services and directions from Fidelity. C.H.A. at no time authorized Canel to settle the claim and had no knowledge of settlement "until long after the date the settlement was made and until after the Fidelity General Insurance Company" was placed in liquidation.

Canel stated in court during discussion on the motions that upon settlement before Judge Clark, he immediately telephoned the defendant, C.H.A., to advise that the claim was settled for \$30,000, that C.H.A. made no objections and raised no objection until such time that it was notified of the insolvency of its liability carrier, Fidelity.

C.H.A., through its staff attorney, Robert K. Hick, answered a request for admission of facts by admitting the following: (1) C.H.A. was aware of the litigation; (2) C.H.A. was aware it was named the party defendant; (3) C.H.A. was aware that Canel & Canel had filed an appearance in behalf of C.H.A. and C.H.A. was in fact represented by Canel; (4) at no time did C.H.A. object to its insurance carrier or any other person, company or organization to its being represented by Canel & Canel; (5) C.H.A. was not aware of the name of the judge before whom the case was assigned for trial, but was aware the case had been assigned for trial; (6) C.H.A., through its house counsel and other employees, in fact cooperated with Jay Canel in defense of the claim by procuring and making avail-

able various records and witnesses. Hick also answered interrogatories put to him by the plaintiff: That he was the C.H.A. person directly responsible for making witnesses available for trial, that "sometime after settlement (the exact date is unknown)" Jay Canel informed him that Fidelity had directed Canel to settle the case for \$30,000, that through him (Hick), C.H.A. cooperated with Fidelity and Canel under the terms and conditions of C.H.A.'s liability insurance policy with Fidelity, by answering inquiries and obtaining information for the carrier and its attorneys, but C.H.A. didn't at any time authorize, direct or request anyone to take any specific actions with reference to the case, through and including the time the case was settled by Canel "for" Fidelity.

An affidavit by Jay A. Canel stated: In May or June of 1968 the case was "turned over" to him by Fidelity to prepare a resume of the file and represent the company at the circuit court of Cook County, 1968 summer pre-trial program, but the case was not settled during the summer of 1968. The case was then "turned over" to him to complete preparations for trial and to try the case. On August 12, 1971, Kenneth Shorb, vice-president of claims for Fidelity, directed him to offer plaintiff \$30,000 in settlement. He did not discuss settlement negotiations or the terms of settlement with the C.H.A. or any of its representatives. He did write to Hick in gathering information for defense of the case, but did not receive orders or directions from Hick or any other C.H.A. staff member until after Fidelity was placed in rehabilitation at which time C.H.A. retained him. Attached to Canel's affidavit was a copy of the Fidelity policy showing bodily injury liability coverage of \$200,000 for each person and \$500,000 for each accident. Under coverage B - "Bodily Injury Liability -

Except Automobile", Fidelity agreed: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident." Paragraph II, entitled "Defense, Settlement, Supplementary Payment", provided:

"With respect to such insurance as is afforded by this policy, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; ... and the amounts so incurred, except settlements of claims and suits are payable by the company in addition to the applicable limits of liability of this policy."

An affidavit of Lee Colombik states that he was the claim supervisor at Fidelity and supervised Freddie Hill's claim against the C.H.A. On August 10, 1970, Jay Canel called him saying he was on trial before Judge Clark and Colombik told Canel to "sound out" the plaintiff and call him before tendering an offer. Colombik called Ann Galaub, claims supervisor of Stuyvesant Insurance Group, reinsurer of Fidelity's general liability over \$25,000 and on August 11, 1970, requested authorization to try the case. She referred him to Mr. Martini, vice-president of Stuyvesant. Later that day, a memorandum in Colombik's file indicated: "A. Galaub called. Authorization \$30,000. Demand of \$50,000 reduced to \$40,000." A telegram from Martini also contained in Colombik's file stated: "Recommend offer of \$30,000. I feel a defendant's verdict will result." On August 11, Colombik talked to Canel in the judge's chambers and made the following notation: "Ready to pick jury - demand \$40,000. Advise to pick jury to reduce demand - if not try case -." On August 11, 1970, Colombik noted he had called

Galaub, advising: "Settlement was consumated in the amount of \$30,000."

An affidavit of Joseph A. Rosen, plaintiff's trial attorney stated: During the course of the trial, settlement negotiations culminated in an offer which plaintiff accepted, and pursuant to the offer releases were immediately prepared and executed, the settlement negotiations were conducted in the court's chambers; as soon as they were concluded, Attorney Canel expressed his desire to advise the C.H.A. that the case was settled so that witnesses who were standing by need not be made available and, pursuant thereto, counsel left and made a telephone call "presumably for the reason expressed"; not less than 30 days after the settlement and the delivery of the releases, plaintiff telephoned the office of Jay Canel requesting the settlement check and was advised that the insurance company was in, or about to go into liquidation and the settlement draft would not be forthcoming; at no time prior to this phone call was there any attempt by the C.H.A. or anyone in its behalf to contact plaintiff or in any way repudiate the settlement.

C.H.A. maintains the settlement is not binding because it neither authorized Canel's settlement nor subsequently ratified it and that even if the settlement were binding, a subsequent "change in circumstances" (Fidelity's insolvency) required that the settlement be set aside. A corporation, unlike an individual, may appear in an action "only by attorney". (Tom Edwards Chevrolet v. Air-Cel, Inc. (Second Dist.: 1973), 13 Ill.App.3d 378, 380, 300 N.E.2d 312. As in the case of individuals, however, a corporation may enter into a written agreement to employ counsel and thus authorize an attorney to appear on its behalf. It is undisputed that C.H.A. specifically agreed with Fidelity that Fidelity would "defend any suit" against C.H.A. seeking damages even if the suit were groundless and that Fidelity might "make such investigation, negotiation and settlement of any claim or suit" as it deemed "expedient" [Emphasis

supplied]. C.H.A., therefore, authorized Fidelity to represent it generally in such claims and was aware that Fidelity was handling this particular matter. It is undisputed that Fidelity employed Canel and gave Canel specific authority to settle the claim. Had C.H.A. made some attempt to control the conduct of the litigation or engaged in other conduct inconsistent with this policy provision, different questions concerning the authority of the attorney handling the lawsuit on behalf of Fidelity and C.H.A. might be presented. But C.H.A. did not do so. Consistent with its contract of insurance, it left negotiations and settlement of the claim to Fidelity. Having done so, it cannot now escape the consequences of the settlement.

On the authority of Vece v. DeBiase (1964), 46 Ill.App.2d 248, 252, 197 N.E.2d 79, appeal dismissed 31 Ill.2d 542, 202 N.E.2d 482, defendant next argues that the settlement may be set aside on account of a subsequent material "change in circumstances" - Fidelity's insolvency. But the court in Vece held the "offer" to settle could be withdrawn, "since the proposed settlement agreement was made expressly contingent upon the approval of the Probate Court, the approval of which was never obtained"; such is not the case here.

A release may be set aside only on the grounds of fraud, or mutual mistake. Like any other contract, it is entitled to be enforced absent these conditions. In Martin v. Po-Jo, Inc. (Second Dist: 1969), 104 Ill.App.2d 462, 467-468, 244 N.E.2d 851, plaintiff who signed a release in settlement of a personal injury claim, and was paid the \$1,000 agreed upon, sought to have the release and settlement set aside, but the court stated:

"Illinois follows the majority of jurisdictions in allowing a court to set aside a release executed by a tort victim when the facts indicate that

the parties were mutually mistaken as to the extent of the releasor's injuries. The mistake must be mutual, and a unilateral or self-induced mistake of fact will be insufficient to void a release. The burden of proving a release should be set aside rests with the party urging the invalidity of the document, and the evidence must be clear and convincing, inasmuch as the law favors compromise. Welsh v. Centa, 75 Ill. App.2d 305, 311-312, 221 N.E.2d 106 (1966)."

In Thornberry v. Board of Education of the City of Chicago (1972), 8 Ill.App.3d 351, 290 N.E.2d 360, the court has recently set forth the allegations necessary to state a cause of action for enforcement of a compromise and settlement as follows (8 Ill.App.3d 351, 354):

"Personal injury claims are frequently orally compromised and settled prior to trial. It is generally known in the legal profession that the compromise is not considered final or concluded until either a judgment has been entered, the case disposed or releases have been signed. (See Vece v. DeBiase, 46 Ill.App.2d 248, 252, 197 N.E.2d 79.) Therefore, in a complaint to enforce the compromise and settlement of a personal injury claim, facts must be alleged which show liability to the claimant, agreement to pay an amount, acceptance of the agreement in settlement of the claim and that the agreement was concluded by disposition of the cause through entry of judgment or the claimant's execution of or willingness to execute releases."

These requirements were met in the case at bar. The undisputed evidence before the court showed that Canel, as authorized by Fidelity, offered and plaintiff accepted \$30,000 in full settlement, the court was informed, the jury dismissed, the witnesses sent home, releases executed and the cause dismissed. No authority is cited for the dubious proposition that a subsequent "change in circumstances" is grounds for setting aside a written release in a personal injury case. The defendant did not allege fraud or mutual mistake. The trial court's entry of summary judgment for defendant and dismissal of plaintiff's complaint was, therefore, in error.

Defendant has made no suggestion either in the trial court or in the briefs filed in this court that the amount C.H.A.

offered and plaintiff accepted and which was made the subject of the release was anything but a fair and reasonable settlement of plaintiff's cause of action against C.H.A. Therefore, the judgment of the circuit court of Cook County is reversed and the case is remanded with instructions to enter summary judgment for the plaintiff and against the defendant, C.H.A., in the amount of \$30,000.

Reversed and remanded
with instructions.

Third Division. Mr. Justice Mejda did not participate.



17 I.A. ^{3D} 66

No. 58490

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
MAURICE MITCHELL,	)	HONORABLE
	)	ROBERT J. COLLINS,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Maurice Mitchell, defendant, was indicted on one count of armed robbery and two counts of aggravated battery in violation of sections 12-4 and 18-2 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, pars.12-4 and 18-2.) After a bench trial, he was found guilty of all three counts of the indictment and was sentenced to a term of five years to five years and one day on the count of the indictment charging him with armed robbery. On appeal the defendant contends that the evidence was insufficient to establish his guilt beyond a reasonable doubt, that one of his two convictions for aggravated battery should be reversed since they both arose out of a single transaction, and that his minimum sentence is excessive and should be reduced.

At trial the following evidence was adduced: Norma Meadows testified that on December 10, 1971, at approximately 11:30 P. M., she was leaving the tavern at 13th and Pulaski, Chicago, Illinois, with her boyfriend, Jessie Dukes. As they were entering Dukes' car, the defendant and a second man came out of the tavern and called to Dukes. Dukes went around to the front of the car to where the men were standing. Dukes and the men talked for a few minutes and the defendant then put a knife around Dukes' neck. Miss Meadows immediately drove the car away and went to find a policeman. She found a policeman and led him back to the scene of the occurrence. Upon her arrival with the

police at 13th and Pulaski, she observed the defendant and the second man involved in the incident exiting from the tavern. She identified both men to the police officer, who immediately placed them under arrest. Dukes had a cut on the side of his head and his pants' pocket was torn. The incident took place between two street lights on each side of the tavern.

Jessie Dukes testified that on December 10, 1971, at approximately 11:30 P. M., he was exiting from a tavern at Pulaski and 13th Street, Chicago, Illinois, with his girl friend, Norma Meadows. The defendant and a second man came out of the tavern and called to him. Dukes testified that he proceeded over to the men to see what they wanted. As he approached the men, the defendant put a knife around his neck. A struggle ensued, during which the defendant cut Dukes' face and small finger with the knife. While the defendant held the knife to Dukes' throat, the second man came up and tore off Dukes' pocket, which contained money. The second man then said, "I got it." Both men then fled, telling Dukes not to turn around or look back. Dukes ran down Pulaski Road and upon seeing a squad car returned to the tavern at Pulaski and 13th. Upon his arrival back at the scene, the police already had the defendant and the second man in custody. Dukes was transported to the hospital, where he received six stitches in his small finger and two stitches in the side of his face. There were two street lights on both sides where the incident occurred, one approximately 25 feet away and one approximately 30 feet away.

Chicago Police Officer Nigro testified that on December 10, 1971, at approximately 11:30 P. M., he was stopped by Norma Meadows in the vicinity of Karlov and Roosevelt Road, Chicago,

Illinois. After a conversation with Miss Meadows, he followed her back to the tavern at 13th and Pulaski. Upon his arrival at the scene, Miss Meadows identified the defendant and a second man, who were then placed under arrest. After Miss Meadows pointed out the two men, they started to run westbound down the street. Officer Nigro exited his vehicle, pulled his service revolver and called to the men to halt. The men stopped and were placed under arrest. A search of the defendant Mitchell revealed a long blade knife in his right rear pocket.

Maurice Mitchell, defendant, testified that on December 10, 1971, at approximately 10:30 P. M., he had an argument with Dukes outside the tavern at 13th and Pulaski. Present during the argument was a third man named Simmons. Defendant testified that during the argument he pulled his knife, but denied he ever took any money from Dukes. He stated that as far as he knew he did not cut Dukes. After the argument he went into the tavern. At approximately 11:05 or 11:15 the police arrested him as he was coming out of the tavern. Defendant denied that he attempted to run away from the police.

Chicago Police Officer McCluskey testified that on December 10, 1971, at approximately 11:30 P. M., he had occasion to be in the vicinity of 13th Street and Pulaski, Chicago, Illinois. He observed Dukes, who had a cut on his face and on his left hand and whose clothes were covered with blood.

Defendant's first contention on appeal is that the evidence was insufficient to establish his guilt of the crime of armed robbery beyond a reasonable doubt. He argues that the evidence demonstrates that a quarrel was involved and not an armed robbery, that his conduct after the incident in remaining at the scene until the police arrived is inconsistent with an armed robbery,

and that the complainant's testimony was vague about any property taken.

The rule is well established that in a bench trial it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to the defendant's guilt will the finding of the trial court be disturbed. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385; People v. Poynter, 6 Ill.App.3d 113, 285 N.E.2d 171.) Minor discrepancies and inconsistencies do not destroy the credibility of witnesses but affect only the weight to be given to such testimony. People v. Reese, 54 Ill.2d 51, 294 N.E.2d 288; People v. Strother, 53 Ill.2d 95, 290 N.E.2d 201.

In the case at bar, the testimony of Dukes and Meadows established that as they were getting into their car outside the tavern the defendant and a second man called to Dukes. The defendant pulled a knife and put it to Dukes' throat. Dukes testified that while the defendant was holding the knife to his throat, the other man ripped open his pocket, which contained money, and then said, "We got it." Both men fled, telling Dukes not to turn around. During the incident, Meadows left the scene and flagged down a nearby squad car. Upon her return to the scene, she immediately identified the defendant and the second man. As she did this, both men attempted to flee down the street and it was only after Officer Nigro pulled his service revolver and threatened to shoot that both of the men halted. Defendant had a knife in his possession. Dukes had a cut on his face and on his hand. This evidence demonstrates more than a quarrel.

Dukes testified that while defendant held a knife to his throat the second man took money from his pocket, after which the second man said, "We got it." Both of them then fled. This

testimony established that money was taken from Dukes' person by the use of a dangerous weapon, a knife, and was not in any manner vague. The inconsistency between the testimony of Meadows and Dukes as to whether the defendant pulled a knife immediately upon Dukes' walking up to the men or several minutes later was, at best, a minor inconsistency. Similarly, the defendant's action in re-entering the tavern after Dukes ran down the street was a matter of credibility for the trial judge to determine. After seeing and hearing all of the witnesses, the trial judge felt that the defendant's guilt had been established beyond a reasonable doubt. After a complete review of the record we cannot say that his determination was erroneous.

Defendant's second contention on appeal is that one of the two convictions for aggravated battery should be reversed since both convictions were based upon the same conduct. The transcript and common law record demonstrate that although defendant was indicted and convicted on all three counts of the indictment, one of which charged armed robbery and two of which charged aggravated battery, defendant was sentenced only upon the armed robbery count of the indictment.

In People v. Mathis, 10 Ill.App.3d 642, 295 N.E.2d 40, the defendant was indicted on and convicted of three counts of aggravated battery and one count of attempt murder. Defendant was sentenced on the single count charging him with attempt murder. On appeal, defendant argued that the trial court erred in finding him guilty on all four counts of the indictment since they all arose out of the single transaction. In rejecting this argument, this court said:

"The record clearly shows that although defendant was found guilty of all four counts of the indictment, he was sentenced only on the count charging him with the greater offense, attempt murder. Since there were no additional sentences on

the findings of guilty on the other three counts, defendant was not prejudiced nor were any of his rights violated by the findings. People v. Perry, 47 Ill.2d 402, 266 N.E.2d 330; People v. Chacon, (First Dist., No. 55402); People v. Lilly, 9 Ill.App.3d 46, 291 N.E.2d 207."

Similarly, in the case at bar, since defendant was not sentenced on either of the counts charging him with aggravated battery, he was in no way prejudiced by those findings nor were any of his rights violated.

Defendant's final argument is that his minimum sentence should be reduced to a term of four years in accordance with the Unified Code of Corrections. The State in its brief states that defendant's youth and minimal criminal record are sufficient to justify a reduction in defendant's minimum sentence to a term of four years. After a complete review of the record, we conclude that the facts as adduced at trial and the defendant's minimal criminal record are sufficient to justify a reduction in his minimum sentence to a term of four years.

For the foregoing reasons, defendant's minimum sentence is reduced to a term of four years and the judgment of the circuit court of Cook County, as modified, is affirmed.

Judgment affirmed as modified.

Third Division. Mr. Justice Mejda did not participate.



58584

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County,
vs.)	
	)	Honorable
MICHAEL BRADDOCK,	)	John J. Crowley,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Michael Braddock, defendant, was found guilty after a bench trial of the offense of theft in violation of section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1)). He was placed on probation for a period of one year with the condition that the first four months be served in the House of Correction.

On appeal, defendant's only argument is that the condition that he serve four months in the House of Correction as a condition of probation is improper under the Unified Code of Corrections. Since defendant does not challenge the sufficiency of the evidence against him, a detailed recitation of the facts is unnecessary.

Defendant's case has not yet reached the stage of final adjudication, therefore, the Unified Code of Corrections is applicable. People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269. Here, the defendant was sentenced to one year's probation with the condition that the first four months be served in the House of Correction, a so called "split-sentence". Section 1005-6-3(d) of the Unified Code of

Corrections provides:

"(d) The court shall not require as a condition of the sentence of probation or conditional discharge that the offender be committed to a period of imprisonment except under article 7."

Article 7 provides only for periodic imprisonment.

The State has responded by arguing that section 1005-6-3(d) of the Unified Code of Corrections is unconstitutional as an unreasonable classification and as an invasion of the power of the judicial branch of government. In People v. Ortiz, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 57819, decided November 13, 1973), this court answered both of the State's arguments when the court said:

"Secondly, we do not agree with the State that the prohibition against split-sentencing is a usurpation of judicial power. We agree that the power to impose a sentence as a punishment for crime is purely judicial. (People v. Montana, 380 Ill. 596, 44 N.E.2d 569.) However, the legislature has the power to determine the nature, character and extent of punishment in light of the public interest. (People v. Smith, 14 Ill.2d 95, 150 N.E.2d 815.) The prohibition of split-sentences indicates the legislature's redefinition of the nature and character of probation. The determination of whether defendants shall be admitted to probation, as well as the period of probation and the conditions of probation, within the limits set forth in the statute, remain in the discretion of the trial court.

* * * * *

"For these reasons we conclude that Section 1005-6-3(d) does not violate the Illinois Constitution."

In the case at bar, the condition that defendant spend the first four months in the House of Correction is improper under the present Unified Code of Corrections and must be vacated.

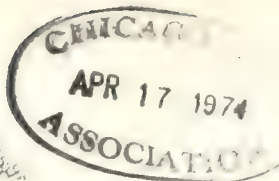
We have noted that the Unified Code of Corrections has now

been amended by Public Act 78-939 to provide that a defendant may be imprisoned as a condition of probation for up to six months. However, the Act does not provide an effective date and, therefore, would not be effective until July 1, 1974 (1970 Illinois Constitution, Article IV, section 10). People ex rel. Klinger v. Howlett, 50 Ill.2d 242, 278 N.E.2d 84.

For the foregoing reasons, we hereby modify the order of probation by eliminating the condition that defendant serve the first four months in the House of Correction. As modified, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

Third Division: Justice Mejda did not participate.



3D
17 I.A. 112

58623

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
J. C. MIXON,	)	HONORABLE
	)	ROBERT J. DOWNING,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DISTRICT, FIFTH DIVISION*):

Petitioner appeals the dismissal of his post-conviction petition. He was originally charged by indictment with the crime of murder. On November 16, 1970, he withdrew his plea of not guilty, and a negotiated plea of guilty to voluntary manslaughter was accepted by the court and he was sentenced to a term of 10 to 20 years. On December 7, 1971, petitioner filed a pro se post-conviction petition, alleging that his minimum sentence was excessive in that it exceeds one-third of the maximum sentence. On August 31, 1972, the post-conviction petition was dismissed upon motion of the State.

Petitioner's only argument on appeal is that he is entitled to post-conviction relief since he had merely "lost his head" in a domestic argument and his sentence of 10 to 20 years was therefore not "proportioned to the nature of the offense" as required by article II, section 11 of the 1870 Constitution of the State of Illinois. To merit relief under the Illinois Post-Conviction Hearing Act, a petitioner must allege a substantial denial of his constitutional rights in proceedings which resulted in his conviction. People v. Ashley, 34 Ill.2d 402, 216 N.E.2d 126. Where the sentence imposed upon

* Justice Drucker did not participate

a defendant is within the statutory limits, the severity of the sentence does not raise a constitutional question.

People v. Lee, 5 Ill.App.3d 421, 283 N.E.2d 740. The allegation that the severity of his sentence violates article II, section 11 of the 1870 Constitution of the State of Illinois does not raise a substantial constitutional question recognizable under the Illinois Post-Conviction Hearing Act. People v. Heard, 10 Ill.App.3d 445, 294 N.E.2d 110. In the case at bar, petitioner's pro se post-conviction petition did not show a substantial denial of his constitutional rights and was properly dismissed by the trial judge.

In the absence of a direct appeal, there has been a final adjudication of defendant's sentence so that the Unified Code of Corrections does not apply and the precept that the minimum shall not exceed one-third of the maximum sentence is not applicable.

The judgment of the circuit court is affirmed.

Affirmed.

(Publish abstract only.)

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PEOPLE OF THE STATE OF ILLINOIS,)	
)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	COURT OF COOK COUNTY.
)	
vs.)	
)	
CLARANCE E. DAVIS,	)	HON. EARL J. NEAL,
	)	Presiding.
Defendant-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Clarence E. Davis, defendant, was found guilty after a bench trial of the offense of criminal trespass to a vehicle in violation of section 21-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 21-2.) He was sentenced to a term of 30 days in the House of Correction. On appeal, defendant contends that he did not understandingly waive his right to a trial by jury and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, the following evidence was adduced: Margie Hudson testified that on October 14, 1972, while visiting her sister, she parked her 1972 Chevrolet Nova in front of her sister's home at 847 W. 53rd Street, Chicago, Illinois. At approximately 2:00 A. M., she came out of her sister's house and observed that the hood to her automobile was up. The defendant was loosening the battery cables with a wrench under the hood of her car. Miss Hudson confronted the defendant who stated that he was trying to help get the car started for a friend. There was a second man with the defendant who ran and was not apprehended.

William Mofher, a Chicago police officer, testified that on October 14, 1972, at approximately 2:00 A. M., he responded to a call and proceeded to 847 W. 53rd Street, Chicago, Illinois. After a conversation with Miss Hudson, he placed the defendant

*Mr. Justice Hallett did not participate.

under arrest and advised him of his constitutional rights. The defendant then stated that he was helping a friend take the battery out of the car.

Clarence E. Davis, defendant, testified that on October 14, 1972, at approximately 2:00 A. M., a friend of his asked him to help take the battery out of the car in question. As he was aiding the friend, Miss Hudson came out of the house and asked what he was doing. He replied that he was trying to get the battery out of the car for a friend.

Defendant's initial argument on appeal is that he did not understandingly waive his right to a jury trial. At trial, defendant was represented by an assistant public defender. When the case was called, the following occurred:

"THE CLERK: Clarence Davis.

"MR. GIGLIO (assistant State's attorney):
We are ready for trial.

"MR. KLECZEK (assistant public defender):
The defendant is ready. He
waives his right to a jury trial, your
Honor, wishes to be tried by this court.

"THE COURT: All right, and what's the plea?

"MR. KLECZEK:
Plea of not guilty."

In People v. Sailor, 43 Ill. 2d 256, 253 N. E. 2d 397, the Supreme Court held that a defendant speaks through his attorney and that by permitting his attorney, in his presence and without objection, to waive his right to a jury trial, a defendant acquiesces in and is bound by his attorney's conduct. The rule, as announced in Sailor, is also applicable to court-appointed counsel. People v. McClinton, 4 Ill. App. 3d 253, 280 N. E. 2d 795; People v. Irving and Pass, (Gen. Nos. 58195, 58196, decided October 18, 1973), ____ Ill. App. 3d ____, ____ N. E. 2d ____.

In the case at bar, appointed counsel had obviously conferred with defendant prior to the case being called as evidenced by counsel's knowledge of the facts during trial. Defendant's conduct, in permitting his attorney, in his presence and without any objection, to waive his right to jury trial and enter a plea of not guilty, constitutes a valid jury waiver binding upon defendant.

Defendant's second argument on appeal is that he was not proven guilty beyond a reasonable doubt because the evidence failed to establish the prerequisite knowledge on the part of the defendant. The basis of defendant's argument is that his trial testimony that he was trying to help a friend take a battery out of the car was unrebutted and raises a reasonable doubt as to his guilt. Defendant was convicted of criminal trespass to a vehicle in violation of section 21-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 21-2), which states:

"Whoever knowingly and without authority enters any vehicle, aircraft or watercraft or any part thereof of another without his consent***."

Under this section, knowledge is an essential element which must be proven. (People v. Owes, 5 Ill. App. 3d 936, 284 N. E. 2d 465.) However, knowledge may be established by circumstantial evidence. (People v. Zazzetti, 6 Ill. App. 3d 858, 286 N. E. 2d 745.) Here, the evidence clearly established that at 2:00 A. M., the defendant was observed with a wrench loosening the battery cables under the hood of Miss Hudson's car. When first confronted by Miss Hudson, defendant stated that he was trying to help a friend start the car. Subsequently, defendant stated to the police officer, as he testified at trial, that he was helping a friend take the battery from the car. Where a defendant attempts to explain his conduct, he must tell a reasonable story or be

judged by its improbability. (People v. Moore, 130 Ill. App. 2d 266, 264 N. E. 2d 582.) If defendant's story were true, we cannot believe that the defendant would, when initially confronted by the complaining witness, have stated that at 2:00 A. M. he was merely trying to help a friend start the car and then subsequently tell a different story to the police officer, who shortly thereafter arrived upon the scene. Considering all of the evidence adduced at trial, we believe defendant's guilt has been proven beyond a reasonable doubt.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment Affirmed.

(Abstract Only).

PEOPLE OF THE STATE OF ILLINOIS
ex rel. ROBERT T. KEYES,

Relator-Appellant,

v.

JOHN J. TWOMEY, Warden, ILLINOIS
STATE PENITENTIARY, Joliet,
Illinois,

Respondent-Appellee.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

PER CURIAM * (FIRST DIVISION; FIRST DISTRICT):

Robert T. Keyes (hereinafter "relator") was found guilty of murder and was sentenced to a term of 14 years to 20 years in the penitentiary on August 25, 1967. On July 26, 1972, relator filed a pro se petition for writ of habeas corpus and, on motion of respondent, the petition was dismissed. Relator appealed.

The Public Defender of Cook County was appointed relator's counsel on appeal and has filed in this court a motion for leave to withdraw as appellate counsel; the motion is supported by a brief filed pursuant to Anders v. California, 386 U.S. 738, in which appellate counsel states that the only question which can be raised from the record on this appeal is, "Whether the relator was denied procedural due process of law in his habeas corpus hearing." The brief concludes that the trial court did not abuse its discretion in dismissing the habeas corpus petition. Relator was forwarded copies of the motion and brief and was allowed additional time within which to file any points he wished in support of the appeal. Relator has not responded.

The sole jurisdictional ground raised by relator in his petition of writ of habeas corpus relates to the alleged failure of the grand jury foreman to sign the murder indictment returned against relator, as required by statute. (Ill. Rev. Stat. 1965, ch. 38, par. 112-4 (c).) However, relator's references in his petition relate to copies of the indictment, whereas the original

indictment, a fact admitted to by relator's counsel at the hearing on the petition, was signed by the foreman of the grand jury. This ground consequently presented no issue upon which the trial court could have granted relief under the habeas corpus statute. Ill. Rev. Stat. 1971, ch. 65, par. 22.

Also raised as grounds for relief in the petition for habeas corpus was the alleged violation at trial of certain of relator's constitutional rights. It has been consistently held that habeas corpus is not available to remedy errors of that nature; unless it is shown that the judgment of conviction was void or that something has happened since its rendition to entitle the prisoner to his release, the court lacks jurisdiction to entertain a petition for habeas corpus. People ex rel. Jefferson v. Brantley (1969), 44 Ill.2d 31, 253 N.E.2d 378; People ex rel. Skinner v. Randolph (1966), 35 Ill.2d 589, 221 N.E.2d 279. We are in agreement with appellate counsel's position that the trial court did not abuse its discretion in dismissing relator's petition for habeas corpus.

In accordance with our duty under the Anders decision, our independent review of the record in the instant matter reveals no additional grounds upon which the appeal may be predicated. We are of the opinion that the appeal is frivolous and wholly without merit.

The motion of the Public Defender of Cook County for leave to withdraw as appellate counsel is accordingly allowed, and the judgment of the circuit court of Cook County is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED.

ABSTRACT ONLY.

* Egan, J., took no part.

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff-Appellee,

v.

CHARLES RICHERRSON,

Defendant-Appellant.

FROM THE CIRCUIT COURT
OF COOK COUNTY.HONORABLE ROBERT L. MASSEY,
PRESIDING.

PER CURIAM * (FIRST DIVISION, FIRST DISTRICT):

Charles Richerson (defendant) was charged in an eight-count indictment with three counts of attempt murder, four counts of aggravated battery and one count of aggravated assault, in violation of sections 8-4, 12-4 and 12-2, respectively, of the Criminal Code. (Ill.Rev.Stat. 1969, ch. 38, pars. 8-4, 12-4, 12-2.) He was found guilty after a jury trial of the attempt murder of William O'Neill, Gerald LaLena and Vincent DeBaro, of the aggravated battery of William O'Neill and Vincent DeBaro, and of the aggravated assault of Mildred Lundine Richerson. Defendant was sentenced to terms of six years to twelve years on each of the attempt murder convictions and to terms of three years to five years on each of the aggravated battery and aggravated assault convictions, all terms to run concurrently.

On this appeal defendant contends that the State did not prove him guilty of the offenses of attempt murder beyond a reasonable doubt, that the trial court committed "plain error" in giving an allegedly faulty "definition of murder" instruction, and that it was error to have convicted defendant upon the attempt murder and the aggravated battery charges involving William O'Neill and Vincent DeBaro, since those offenses arose out of the same course of conduct on his part.

The evidence adduced by the State disclosed three separate but related confrontations, between the defendant, who at various times was armed with one or more handguns, and Mildred Lundine Richerson; between him and William O'Neill and Gerald LaLena; and between him and Vincent DeBaro. Mildred Lundine Richerson was defendant's wife

* Mr. Justice Hallett did not participate.

and at the time of the incident in question had an action for divorce pending against him; and O'Neill, LaLena and DeBaro were police officers employed by the Village of Bellwood, Illinois, who had been summoned to investigate a disturbance at the Richerson residence in Bellwood.

On May 31, 1971, the defendant resided with his wife (Mildred Lundine Richerson) and her three children by a previous marriage, one of whom was married to Mrs. Janet Lundine. At about 7:00 p.m. on that date Mrs. Lundine Richerson was seated in the living room of the house, watching television with Janet Lundine, Janet's infant son and a family friend, Mrs. Mary Herman, when the defendant entered the house, drew a handgun, pointed it at his wife and threatened to kill her. One of Mrs. Lundine Richerson's sons who was nearby was sent to a neighbor's house from where the police were summoned.

Bellwood police officers O'Neill and LaLena responded to a radio call that a man was holding a gun on his wife at the Richerson residence and entered the front door of that house after knocking and being asked to enter. The officers were dressed in uniform and did not unholster their service revolvers at that time. The defendant turned his gun toward the officers when they entered, threatening to kill them if they did not discard their service revolvers. Mrs. Lundine Richerson and her companions left the living room and fled to a bedroom in the rear of the house.

Officer O'Neill spoke to the defendant in an effort to have him discard his gun, and the officer thereafter unholstered and unloaded his own weapon and placed it on a table. Officer LaLena offered to do the same with his service revolver, but defendant threatened to kill him if he did not turn the weapon over to the defendant. Defendant thereupon took possession of Officer LaLena's loaded gun and, with one gun in each of his hands, forced the officers from the living room of the house to the kitchen, with

Officer O'Neill proceeding first, Officer LaLena second and the defendant third.

Upon reaching the kitchen, Officer LaLena heard a shot from behind him and attempted to take cover behind the refrigerator. A second shot was heard and Officer O'Neill was shot in the shoulder from behind, the bullet passing through his body and exiting the front. The defendant then fired four or five shots at Officer LaLena, who was behind the refrigerator, left the kitchen momentarily and returned and fired a third shot in the direction of Officer O'Neill, who had taken refuge under the kitchen table. Officer LaLena stated to the defendant that Officer O'Neill was hurt and that an ambulance should be summoned, and the defendant, who was screaming at this point, stated that O'Neill was unhurt.

A voice was heard emanating from the front of the house and the defendant left the kitchen; Officer LaLena went to the aid of Officer O'Neill. A struggle then took place at the front of the house; Officer DeBaro, who had arrived on the scene as a "back-up" unit, was wrestling with the defendant for possession of the handguns. It appears that Officer DeBaro entered the Richerson house with his service revolver also holstered, thinking that the other officers had matters under control, and was confronted by the defendant, who ordered him to discard his weapon under a threat of death. As the defendant was reaching for Officer DeBaro's revolver, which the officer had placed on a china cabinet in the dining room, the officer engaged in the struggle with the defendant for the defendant's weapons, during which three or four shots were fired, one of them striking the officer in the finger. Officer DeBaro, with the aid of Officer LaLena, prevented the defendant from gaining control of the guns which had fallen to the floor in the struggle, and defendant was subdued and placed under arrest.

It appears that the officers had "prior official business" with the defendant; Officer LaLena testified that he and the other officers had been to the Richerson home in the past "before this

incident. We were able to talk to him (defendant) before; this time we were not." It also appears that Mrs. Herman had observed some of the shooting which took place in the kitchen, and that all of the women and the child who had earlier been present in the living room eventually left the house by way of a window in the rear bedroom.

Defendant testified in his own behalf that he arrived home at about 7:00 p.m. on the evening in question, fixed himself something to eat and seated himself in the living room of the house with those persons theretofore present. He testified that he heard heavy footsteps in the front of the house, that Officers O'Neill, LaLena and DeBaro entered and demanded to know from him what was the matter, and that the other members of his family who had been present left the room. The defendant testified that he asked the officers for a warrant, that one of the officers shoved him against the entrance to the kitchen, and that Officer DeBaro drew back his fist. The defendant stated that he shoved Officer DeBaro, knocking him to the floor; that the other two officers took hold of the defendant; and that Officer DeBaro attempted to reach a gun which had fallen from the officer's holster upon impact with the floor. When the officer was unable to reach that weapon, he drew a second weapon from his pocket, rose to his feet and aimed the gun at the defendant's head. The defendant testified that he lunged into one of the officers who was holding him, that the DeBaro gun discharged and that Officer O'Neill was struck in the shoulder. The defendant entered the kitchen, the officers followed and fired shots at him; he eluded the officers and went into the living room and there he received assurances from the officers that they would not kill him. The defendant testified that he was beaten unconscious after he was arrested and taken to the police station and that he remained in the hospital 23 days due to the injuries thus received. The defendant denied firing any weapon in his home on the day in question, denied threatening his wife on that day, and stated that neither he

nor the officers had any guns drawn at the time the officers initially entered the house.

Expert evidence was introduced for the defense that bullet fragments found on a china cabinet in the home contained pieces of human flesh; that the gun introduced into evidence as State's Exhibit #1, identified as being the weapon used by the defendant, was neither reported stolen nor listed on a "wanted report"; that certain weapons were tested for fingerprints, but nothing suitable was found thereon to enable a fingerprint comparison; that certain shirts entered into evidence did not have powder burns around the holes observed in those garments; and that the Bellwood Police Department did not respond to a request by evidence investigators for samples of the blood of the parties connected with the incident. Several photographs of the layout of the Richerson residence were identified and entered into evidence. Evidence offered by the State in rebuttal tended to contradict several aspects of the defendant's version of the incident, relative to whether Officer DeBaro fired a gun in the Richerson home, whether he had one or two guns when he entered that house, whether the officers surrendered their weapons to the defendant and the like.

In support of his contention that the State's evidence was insufficient to prove him guilty of the attempt murder offenses beyond a reasonable doubt, the defendant argues that the State failed to prove that he had formed the specific intent to kill the police officers, in light of such evidence as the fact that although numerous shots were fired at Officers O'Neill and LaLena from "point blank range" in the kitchen, only one of the officers received a wound therefrom; the fact that defendant was asked to summon aid for one of the wounded officers, whom the defendant believed was unhurt; and the fact that Officer DeBaro was merely wounded in the finger in the struggle which the officer himself initiated. Defendant also refers to the exhibits in evidence, which allegedly depict the small size of the Richerson house (which exhibits were

not incorporated in the instant record for this Court's perusal) and concludes that if defendant "had formed the specific intent to kill people in that house, he certainly would have been more destructive than the evidence shows."

Intent to commit a homicide is an essential element to sustain a conviction for the offense of attempt murder; due to its very nature, unless the accused admits having entertained that intent, it must be proved by means of the facts and circumstances surrounding the conduct of which the accused is charged. (People v. Koshiol, 45 Ill.2d 573, 262 N.E.2d 446.) It is not necessary that the accused be shown to have brooded over or entertained such intent for a considerable period of time, but it is sufficient to show that he was actuated in making the assault "by wanton and reckless disregard of human life that denotes malice * * * under such circumstances that, if death had ensued, the killing would have been murder." People v. Coolidge, 26 Ill.2d 533, 536-537, 187 N.E.2d 694.

In this case the State's evidence showed that the defendant verbally threatened the three police officers with death if they did not surrender their service weapons upon their entry into the Richerson house. When the defendant forced Officers O'Neill and LaLena into the kitchen of the house at gunpoint, he fired three shots at Officer O'Neill, striking him once; and he fired four or five shots at Officer LaLena, apparently missing him because the officer took refuge behind the refrigerator. Officer DeBaro was later wounded in the struggle for the defendant's weapons by one of three or four shots discharged from the guns held by defendant, and it further took the efforts of two officers to subdue the defendant and prevent him access to those weapons after they had fallen to the floor. Defendant clearly would have been guilty of murder if the officers had been killed in the course of the incident, and the State consequently adduced sufficient evidence from which

the trier of fact properly found him guilty of the attempt murder offenses.

The cases cited by defendant in support of his position in this regard are not applicable to the circumstances here involved. See e.g., People v. Henry, 3 Ill.App.3d 235, 278 N.E.2d 547.

Defendant further contends that the trial court committed "plain error" in giving to the jury instructions which charged that defendant could be found guilty of attempt murder if the jury found that his acts constituted reckless conduct, without regard to the element of intent to commit a homicide; he further argues that the indictment charging the attempt murder offenses is at variance with the instructions given to the jury in this regard, for the same reason advanced above.

The court instructed the jury as follows on the question of attempt murder:

"A person commits the crime of attempt who, with intent to commit the crime of murder, does any act which constitutes a substantial step toward the commission of the crime of murder.

"The crime attempted need not have been committed."

* * *

"A person commits the crime of murder who kills an individual, if, in performing the acts which cause the death,

"he intends to kill or do great bodily harm to that individual; or

"he knows that such acts will cause death to that individual; or

"he knows that such acts create a strong probability of death or great bodily harm to that individual."

Both of the foregoing instructions are taken from IPI-Criminal, thereby conforming to Illinois Supreme Court Rule 451 requiring the use of IPI-Criminal Instructions where and when appropriate and

applicable in criminal cases. See IPI-Criminal §§ 6.05, 7.01; Ill. Rev.Stat. 1971, ch. 110A, par. 451.

Further, defense counsel made no objection to either instruction when offered at the hearing on instructions, specifically stating "no objection" to the "definition of murder" instruction; defendant cannot now be heard to complain in this regard. People v. Lyons, 36 Ill.2d 336, 223 N.E.2d 99.

Defendant's additional argument under this point that defense counsel's failure to object to the giving of those instructions could not waive the defect in those instructions is without merit. Defendant argues that the "definition of murder" instruction set out above simply charges that he could be found guilty of attempt murder if the jury found that his conduct was reckless, without regard to whether he had the intent to kill the officers. The instant "definition of murder" instruction charges that the defendant must have acted with knowledge of the results, or the probable results, of those acts and therefore includes in the charge to the jury the necessary element of intent on his part. The instruction properly charged the jury as to the definition of murder in the terms of the murder statute, and does not charge the elements of involuntary manslaughter, as defendant implies. (See Ill.Rev.Stat. 1971, ch. 38, pars. 9-1, 9-3; People v. Coolidge, 26 Ill.2d 533, 536-537, 187 N.E.2d 694.) Defendant's further contention in this regard, that there exists a variance between the indictment and the instruction, is also therefore without merit.

The final matter raised by the defendant relates to his having been found guilty of the offenses of attempt murder of William O'Neill and Vincent DeBaro and of the offenses of aggravated battery of those two men. It is clear from the evidence adduced in the case that the convictions of both offenses as to both men arose out of the same course of conduct engaged in by the defendant; the State admits to this fact. The sentence for the lesser offense of aggravated battery as to each man is improper and must therefore be

vacated. (As to the question of whether both the conviction and the sentence for the lesser offense should be set aside, or whether only the sentence therefore should be set aside and the conviction allowed to stand, see People v. Lilly, 9 Ill.App.3d 46, 291 N.E.2d 207; People v. Lilly, Ill.Sup.Ct. #45788, Leave to Appeal allowed May 1973 Term; People v. Brown, Third District #73-93, decided November 9, 1973.

For the foregoing reasons the judgments of conviction and the sentences imposed for the attempt murder of William O'Neill, of Gerald LaLena, and of Vincent DeBaro, and for the aggravated assault upon Mildred Lundine Richerson are affirmed; the judgments of conviction for the aggravated battery of William O'Neill and of Vincent DeBaro are affirmed, but the sentences imposed thereon are vacated. The judgments of the circuit court of Cook County as so modified are affirmed.

JUDGMENTS AFFIRMED AS MODIFIED.



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BARBARA B. KUHN BERGSTROM,)	
Petitioner-Appellant, Cross Appellee,)	APPEAL FROM THE
	)	CIRCUIT COURT
v.	)	OF COOK COUNTY.
)	
JOHN P. KUHN,	)	HONORABLE
	)	ROBERT C. BUCKLEY,
Respondent-Appellee, Cross Appellant.	)	PRESIDING.

PER CURIAM * (First Division, First District):

The plaintiff, Barbara B. Kuhn, appealed from an order which denied her petition to modify the decree of divorce by increasing the provision for child support. She also appealed from the order allowing her only \$500 for attorney's fees and expenses. The defendant, John P. Kuhn, filed a cross appeal from the order which awarded the plaintiff attorney's fees and expenses.

The issues on appeal are (1) whether the trial court erred in denying the plaintiff's petition for an increase in child support and (2) whether the trial court properly awarded her \$500 in full payment of attorney's fees and expenses.

On June 1, 1967, a decree for divorce was entered which provided, in part, that the defendant pay \$450 a month for support of the parties' four minor children. The decree also awarded the plaintiff a \$20,000 lump sum payment in lieu of alimony, to be paid at the rate of \$166 per month for 119 months and a final payment on July 3, 1977, of \$80. Based on a finding that the defendant was earning a gross salary of \$16,000 a year, the decree provided:

"It is contemplated that John's [defendant's] income will, from time to time, increase and that Barbara [plaintiff] shall become employed and commence receiving an income. Therefore, the parties do agree that for purposes of determining a change of circumstances there shall be no such change unless John's income shall exceed Twenty-two Thousand (\$22,000.00) Dollars per year or Barbara's income shall exceed Five Thousand (\$5,000.00) Dollars per year."

The decree further provided that the defendant "shall have reasonable visitation with the said children."

* Mr. Justice Hallett did not participate.

On March 3, 1972, the defendant filed a petition for a rule to show cause alleging that for a period of approximately ten months the plaintiff wilfully refused to allow him to have overnight visitation with the minor children and wilfully refused to allow him to take said children on vacations with him and has otherwise made it difficult for the defendant to visit with his children. On February 10, 1972 [sic], the plaintiff filed a motion to strike the petition for a rule to show cause. At the same time, she filed a petition for an increase in child support, alleging, among other things, that the defendant was employed and earned in excess of \$22,000 annually; that the plaintiff is unemployed, has no income and no separate funds or property from which she can pay attorney's fees; that the sum of \$450 a month for the maintenance and support of the four children of the parties, paid by the defendant to plaintiff, is now inadequate and insufficient to maintain and support said children, because of the increase in the cost of living since the entry of the divorce decree and because of the increase in the ages of said children; and that on June 6, 1970, the defendant's father died, leaving an estate of \$294,000 of which the defendant will receive a one-half interest.

On March 3, 1972, the plaintiff filed a petition for attorney's fees and other expenses. Also on March 3, 1972, the plaintiff filed her answer to the petition for rule to show cause, in which she alleged that she permits the defendant to have frequent visitation with the children upon his request, at times mutually convenient to all parties.

On June 23, 1972, an order was entered which denied the petition for a rule to show cause, but contained visitation and vacation provisions for the defendant and the children.

After a hearing, at which the plaintiff testified in accordance with the allegations of her petition for an increase in child support and defendant testified that his income had been reduced to \$8,500 in 1971, but his net worth had improved because of his father's estate,

the trial court found "that there is no substantial change of circumstances in the context of the Decree for Divorce"; that "the defendant's taxable income is less than \$22,000"; and that "the financial needs of the children have increased with the children's increase in age" and ordered that the plaintiff's petition for increase in child award be denied.

A later hearing was held on attorney's fees for the plaintiff, at which only counsel for the plaintiff testified. Counsel stated that he spent 30 hours in court and 60 hours in conference, preparation of documents, depositions, and other matters; that the fair and reasonable charge for court time would be \$50 an hour and that the fair and reasonable charge for conference and non-court time would be \$40 an hour; that he expended the sum of \$290.80 in costs for deposition and court costs; and that a fair and reasonable charge for attorney's fees would be a total of \$3900. Counsel for defendant argued that the plaintiff had sufficient resources to pay her attorney and, therefore, defendant should not be compelled to pay her attorney's fees. The trial court entered an order granting the plaintiff "the sum of \$500 in full payment as and for all attorney fees and expenses relating to the defense of the petition for rule to show cause and for prosecuting a motion to modify the decree for divorce for an increase in child support payments."

The plaintiff argues that the finding of the trial court to the effect there was no financial change in circumstances since the entry of the decree for divorce is manifestly against the weight of the evidence. Her argument is based upon the fact that the defendant acquired a substantial sum of money from his father's estate; that the needs of the children, who were approximately six to twelve years of age at the time of the decree for divorce, have increased substantially, since they now are eleven to seventeen years of age; that the boy who was nine years old at the time of the entry of the decree now weighs in excess of 200 pounds, is active in football and

other athletics, and requires extra large, adult size clothes, with the resulting increased costs; and that the cost of supporting the four children now is \$1000 a month. The defendant argues that plaintiff is attempting to void the provisions of the divorce decree; that she requests the court to rewrite her agreement and to change the word "income" to include inherited assets; that when a decree embodies an agreement constituting a settlement of property rights and interests between parties, its terms may not be modified under any circumstances; that the court cannot remake an agreement and give a litigant a better agreement than she herself was satisfied to make; and that when the terms are clear and unambiguous, they must be enforced. The defendant also argues that any alteration respecting child support payments rests in the sound judicial discretion of the trial court and unless the record shows an abuse of that discretion the order will not be disturbed on review unless manifest injustice has been done; that the defendant has complied with the terms of the decree of divorce and has paid monthly child support promptly; that all of the moneys the defendant received on the death of his father went into the purchase of varied investments as future security for the children; and that there is no evidence that the children are suffering in any way.

The controlling issue is whether the agreement of the parties, including the provision that there shall be no change of circumstances unless the defendant's income shall exceed \$22,000 a year, which was incorporated in the decree for divorce, is binding on the parties. The law looks with favor upon the amicable settlement of property rights and is reluctant to disturb decrees based thereon. (Guyton v. Guyton, 17 Ill.2d 439, 444-445, 161 N.E.2d 832; Roberts v. Roberts, 90 Ill.App.2d 184, 194, 234 N.E.2d 372.) It has long been settled that parties to a divorce suit may voluntarily adjust their property interests and that when such agreements are made a part of the decree they are binding on the parties. (Garmisa v. Garmisa, 4 Ill.App.3d 411, 422, 280 N.E.2d 444.) When a divorce decree embodies an

agreement constituting a settlement of property rights and interests between the parties, its terms will not thereafter be modified under any circumstances. Jamal v. Jamal, 98 Ill.App.2d 180, 187, 240 N.E. 2d 246.

The agreement, which was made a part of the divorce decree, provided that there would be no "change of circumstances" for the purposes of modifying the decree, unless the defendant's income exceeded \$22,000 a year. The evidence discloses that defendant's 1971 adjusted gross income was \$8500 and, therefore, the trial court rightfully found that under the agreement of the parties there was no change in circumstances which would justify an increase in child support. The mere fact that the trial court found "the financial needs of the children have increased with the children's increase in age" does not justify the nullification of the agreement voluntarily entered into between the parties. This is especially true where the record does not disclose that the children are being denied the necessities of life. The fact that the defendant has received a substantial amount of money from the estate of his father is not justification for nullification of the voluntary agreement of the parties, especially where the record discloses that the money was used to invest in real estate in which the children have an interest.

In light of the record, the trial court properly denied the plaintiff's petition for an increase in child support.

The plaintiff also argues that the denial of the petition for an increase in child support does not alter the fact that the petition was instituted in good faith, under reasonable grounds and with the interests of the children being foremost; that the record shows that plaintiff's attorney spent time in investigations, discovery, motions relating to discovery, and hearings, which is amply corroborated by the undisputed testimony of the plaintiff's attorney to the effect that he was required to spend 30 hours in court and 60 hours out of court; and that the trial court's award of only \$500 for attorney's

fees and costs advanced is clearly against the manifest weight of the evidence and an abuse of the court's discretion.

The defendant argues that to justify an allowance to the wife for attorney's fees, it is necessary that she show that she is financially unable to pay them herself and that her husband is able to do so; and that the plaintiff has sufficient assets of her own to pay her attorney for the services he rendered on her behalf.

The amount of attorney's fees rests in the sound discretion of the trial judge which will not be interfered with unless abused; and the amount of fees depends upon the consideration of, in addition to the relative financial ability of the parties, the nature of the controversy, the question at issue, the significance or importance of the subject matter, the degree of responsibility involved, the standing or skill of the person employed, and the time and labor involved. Greenbaum v. Greenbaum, 14 Ill.App.3d 217, 302 N.E.2d 165.

The attorney for the plaintiff stated that he had expended the sum of \$290.80 in costs for depositions and costs; that he spent 30 hours in court and 60 hours in conferences, preparation of documents depositions and other matters, and that a fair and reasonable charge for court time would be \$50 an hour and \$40 an hour for conference and non-court time. The attorney for the defendant stated that he did not believe counsel for the plaintiff adequately established for the record what fees he is requesting; that he takes issue with the number of hours that counsel for plaintiff has stated were spent in court; that counsel for plaintiff failed to secure an increase in child award for the plaintiff; and that the plaintiff has adequate assets from which she could and should pay her attorney's fees.

If the \$290.80 in costs expended was deducted from the total of \$500 awarded by the trial court, the total amount of attorney's fees awarded the plaintiff would be \$209.20. If any attorney's fees are allowable to the plaintiff, the sum of \$209.20 is totally

inadequate and represents an abuse of discretion by the trial court. Greenbaum v. Greenbaum, 14 Ill.App.3d 217, 302 N.E.2d 165.

It has long been the law in Illinois that in a divorce proceeding allowance of attorney's fees is not automatic but depends upon a showing that one of the parties is financially unable to pay his own fees and that the opposing party does have such ability. (McLeod v. McLeod, 133 Ill.App.2d 111, 113, 272 N.E.2d 834.) No evidence was heard by the trial court on the question of the inability of the plaintiff to pay her own attorney's fees. The only evidence offered was the statement of plaintiff's counsel regarding the extent and value of the services rendered and costs expended. That portion of the order which provides for the allowance of attorney's fees to plaintiff should be reversed and the cause remanded with directions to hear evidence and determine if attorney's fees are properly allowable against the defendant and, if so, to fix the fair and reasonable amount thereof. Breuer v. Breuer, 4 Ill.App.3d 179, 185, 280 N.E.2d 518.

The numerous cases cited by the plaintiff are not applicable to the facts in the case at bar.

The order denying the plaintiff's petition for additional child support is affirmed and the cause is remanded to the trial court with directions to hear the evidence and determine if attorney's fees are properly allowable against defendant and, if so, to fix the fair and reasonable amount thereof.

AFFIRMED IN PART.
REVERSED AND REMANDED IN PART.

NO. 57268



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Petitioner-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
DARRELL McCANTS,	)	HONORABLE
	)	JOSEPH C. MOONEY,
Respondent-Appellant.	)	PRESIDING.

PER CURIAM*

Darrell McCants, defendant, appeals from a judgment terminating a stay of mittimus and committing him to the Department of Corrections. Defendant argues that the supplemental petition which resulted in the termination of his stay of mittimus was insufficient and that the evidence was insufficient to establish his guilt.

The defendant was originally charged by petition with being delinquent for having committed the offense of theft. On January 20, 1972, he was found to be delinquent and was committed to the Department of Corrections. However, the trial judge, in an effort to aid in defendant's rehabilitation, entered a stay of mittimus, specifically informing defendant that if he violated any law the stay of mittimus would be terminated and defendant would be sent to the Department of Corrections. On February 16, 1972, a supplemental petition was filed, alleging that the defendant had committed the offense of aggravated battery during the period in which his mittimus had been stayed. On March 16 and 20, 1972, a hearing was held on the supplemental petition, after which the trial judge terminated the defendant's stay of mittimus and committed him to the Department of Corrections.

At the hearing on the supplemental petition, the following evidence was adduced: Harold Gibson testified that on February 13, 1972, at approximately 12:15 A.M., he was returning home from a basketball game when he observed four or five

boys walking about twenty feet in front of him. One of those boys threw a snowball at a car containing the defendant, Butch Murchison and two other boys. The defendant and Murchison got out of the car and accused Gipson of throwing the snowball. Gipson told them that he did not throw the snowball. Gipson testified that Murchison then jumped him from behind, while the defendant started to hit him from the front. Gipson fell to the ground and was repeatedly hit and kicked by both men; they kicked him in the back of the head and his face hit the concrete, causing him to black out. He woke up in a car with Jeff, James and Jav Strictland, who drove him to his home. The police were called and they took Gipson to Westlake Hospital, where he remained for four days with a skull fracture.

Dorothy Gipson, the mother of Harold Gipson, testified that on February 13, 1972, her son came home in the early morning hours. Her son's face and eyes were black, he was bruised and was bleeding from his head and face.

Leonard Hill testified that on February 12, 1972, he gave the defendant, William Murchison and Charles Ray a ride home from a basketball game. While enroute home, someone threw a snowball through an open window of the car, hitting the defendant. The defendant and Murchison got out of the car to see who threw the snowball. Hill testified that he did not see anything that happened between the defendant and anyone else. Hill testified that he saw someone hit Harold Gipson and Gipson fell to the ground, but he did not remember who was fighting with Gipson.

William Murchison testified that on February 12, 1972, he was returning home from a basketball game with the defendant, Charles Ray and Leonard Hill. While riding down the street, Harold Gipson threw a snowball which hit the defendant. Murchison and the defendant got out of the car and, upon

observing Gipson on the street, asked him why he threw the snowball. Gipson gave some smart remarks and the defendant and Gipson began arguing. Gipson pushed the defendant and a fight ensued. He grabbed Gipson and his brother grabbed the defendant to break up the fight. Gipson then told him to let him go, so he did. Gipson then took a swing at him and he hit Gipson, who fell on the slippery ice.

Charles Ray testified that on February 12, 1972, he was with Murchison, Hill and the defendant, returning from a basketball game. As they were driving down the street, he observed Harold Gipson throw a snowball that hit the defendant. The defendant and Murchison got out of the car and walked over to Gipson. Gipson pushed the defendant and they started to argue. During the fight, the defendant fell to the ground.

Darrell McCants, defendant, testified that on February 12, 1972, he was returning home from a basketball game with Hill, Murchison and Ray when someone threw a snowball into the car, which hit him. He and Murchison got out of the car and asked Gipson why he threw the snowball. Gipson replied that he wasn't throwing it at them. Gipson then pushed him and a fight ensued. Murchison and his brother tried to break up the fight, but Gipson took a swing at Murchison. Murchison then hit Gipson, who fell to the ground.

In rebuttal, Alfred Whitley testified that in the early morning hours of February 13, 1972, he was returning home from a basketball game when he observed Harold Gipson and the defendant fighting. He observed the defendant strike Harold Gipson two or three times. He asked the defendant to stop the fighting and the defendant told him to stay out of it. He then left the area.

Initially we consider the State's argument that the

termination of the stay of mittimus is not an appealable order. The procedure used by the trial judge in the case at bar is commonly used in this county by judges in the Juvenile Division of the circuit court. A defendant, after being found delinquent, is committed to the Department of Corrections. In an effort to aid in defendant's rehabilitation, the trial judge then enters a stay of mittimus, specifically informing defendant that if he violates any law, the mittimus will issue. Although this procedure is not specifically set forth in the Juvenile Court Act, the procedure itself does not violate that act.

For a judgment to be final and appealable, it must terminate the litigation between the parties on the merits of the cause. (People v. Nordstrom, 73 Ill. App. 2d 168, 219 N.E. 2d 151.) Where a stay of mittimus is used in the manner and for the purpose for which it was used in this case, the order terminating the stay of mittimus affected the substantive rights of the defendant and terminated the litigation between the parties. The order terminating the stay of mittimus was therefore an appealable order.

When the trial judge issued the stay of mittimus, he specifically informed the defendant that he would not let the mittimus issue unless the defendant violated a law of the State of Illinois. By this action, the trial judge conferred certain rights upon the defendant. The proceedings which resulted in the termination of the stay of mittimus must therefore comply with basic due process requirements. (In Re Urbasek, 38 Ill. 2d 535, 232 N.E. 2d 716.) A review of the record in the case at bar reveals that the procedure employed by the trial court meets the requirements of due process. Defendant was given notice and a copy of the charge. He was present at the hearing and was represented by counsel.

He had an opportunity to be heard in his own defense. After a review of the entire record, we find that the procedure employed by the trial court in the case at bar did not deny defendant any of his constitutional rights.

Defendant's first contention on appeal is that the supplemental petition which resulted in the termination of the stay of mittimus was insufficient in that it did not comply with section 704-1(2) of the Juvenile Court Act (Ill. Rev. Stat. 1971, ch. 37, par. 704-1(2)). That section sets forth specific requirements of an initial delinquency petition. Defendant argues that since the Juvenile Court Act defines petition to include supplemental petitions (Ill. Rev. Stat. 1971, ch. 37, par. 701-15), all supplemental petitions must comply with the requirements of section 704-1(2). The mere fact that the definition section defines petition to include supplemental petitions does not necessarily transfer to supplemental petitions all the statutory requirements for initial delinquency petitions, especially in the absence of such a provision in section 704-1(2) of the Juvenile Court Act. Here, the supplemental petition was sufficient to apprise the defendant of the charge against him so as to enable him to prepare his defense.

Defendant also argues that the evidence was insufficient to justify termination of the stay. In proceedings to terminate a stay of mittimus, credibility of witnesses is for the trial judge to determine. A reviewing court will substitute its judgment for that of the trial judge only where the testimony is contrary to the manifest weight of the evidence. (People v. Crowell, 53 Ill. 2d 447, 292 N.E. 2d 721.) In the case at bar, the testimony of Harold Gipson was clear and convincing. This testimony alone provided the trial judge with a sufficient basis upon which to find defendant had violated the terms of his stay of mittimus. After a complete

review of the entire record, we cannot say that the trial judge's determination was erroneous.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

*Second Division; Justice Downing did not participate.

Publish abstract only.

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,	) APPEAL FROM THE
	) CIRCUIT COURT OF
	) COOK COUNTY
v.)
	) HON. LOUIS B. GARIPPO,
	) JUDGE PRESIDING.
JAMES GREER,)
)
Defendant-Appellant.)

Mr. JUSTICE BURMAN delivered the opinion of the court.

James Greer, the defendant, was charged by an indictment with armed robbery. Following a bench trial he was found guilty of plain robbery and sentenced to not less than two, nor more than four years in the penitentiary. In a hearing held simultaneously with the trial he was found guilty of violating the terms of a probation imposed for a previous offense and sentenced to from one to two years in the penitentiary, the sentence to run consecutively with that imposed on the robbery charge. He brings this appeal from the robbery conviction only.

On appeal the defendant raises two issues: whether he was proven guilty beyond a reasonable doubt and whether evidence of the identification of him by the victim of the robbery in a line-up should have been suppressed.

We direct our attention first to whether evidence of the victim's identification of the defendant in the police line-up should have been suppressed. The defendant contends that the circumstances surrounding the line-up were so suggestive that to admit testimony concerning the identification that resulted from it was prejudicial error. The record reveals that the robbery occurred at seven o'clock in the morning of December 6, 1971, and that the line-up took place at five o'clock that evening.

Mr. Norman Plath, the victim, described his assailant as a dark complected negro who was between 23 and 25 years old, five feet, eight inches tall, weighed approximately 140 pounds and had a goatee and "wrap around" beard. He further described him as "poorly dressed."

The line-up consisted of five men, all negroes. Of the four who appeared in addition to the defendant, all were casually dressed, and two were wearing dark, three-quarter length jackets similar to the one worn by the defendant. All had short, natural style haircuts, as did the defendant, and three had facial hair. Three were in the defendant's age bracket, and one appeared slightly older. Two were of the defendant's height and build, and two were somewhat taller and heavier. None wore any distinctive clothing or possessed any unusual characteristics.

When Mr. Plath entered the line-up room, all five men were standing in a straight line facing a wall. Each man was asked to turn around, face Mr. Plath, state his name and occupation and face the wall again. When all had done this, Mr. Plath was asked if he could identify any of the men as the perpetrator of the robbery. He unhesitatingly identified the defendant.

The standard for evaluating such an out of court identification procedure is whether the confrontation was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (Coleman v. Alabama (1970), 399 U.S.1.) Nothing in the present record indicates that the composition of the line-up was such that it had the effect of singling out the defendant or that the officers who conducted it did so in a suggestive or improper manner. For this reason we find the cases cited by the defendant inapplicable, and we conclude that the trial court was correct in admitting evidence that the victim identified the defendant.

We turn our attention next to whether the defendant was proven guilty beyond a reasonable doubt. He contends that the identification of him was vague, doubtful and uncertain and that he had an "uncontradicted and an unimpeachable" alibi. Much of what we have said above with respect to the fairness of the line-up applies here as well. In addition the record discloses the following evidence material to the identification of the defendant by the victim. The robbery occurred at approximately seven o'clock in the morning. The victim was sitting in his automobile waiting for a friend. It was daylight, and his windshield was clear. He saw a man walk in front of his car at a distance of eight feet. This man opened the passenger door, crouched down without entering and pointed a gun at Mr. Plath. He ordered Mr. Plath to empty his pockets one by one, and Mr. Plath complied, keeping his eyes on the robber for the entire duration of the incident, which was three or four minutes. The man wore no sunglasses or face covering, and his face was approximately three and one-half feet from Mr. Plath's.

Five minutes later Mr. Plath hailed a passing police car and gave the officer a description of the robber. The defendant was arrested later the same day and was identified by Mr. Plath at the line-up held around five o'clock in the evening. Mr. Plath also made an in-court identification.

The foregoing demonstrates that Mr. Plath was afforded an excellent opportunity to observe the defendant under nearly ideal conditions. It was daylight and his windshield was clear when he first saw the offender walk in front of his car. After the offender had opened the door of the car, Mr. Plath watched him for three or four minutes at a distance of three and one-half feet. The offender did not wear sunglasses or a face covering. Therefore, the defendant's contention that Mr. Plath had an inadequate opportunity to observe the offender is totally unsupported by the record, and there is no merit to the contention that the identification was vague and uncertain.

In addition to Mr. Plath's identification of the defendant, the record contains evidence that the defendant was arrested in a clothing store on the afternoon of the day that the robbery took place attempting to make a purchase with one of Mr. Plath's credit cards. When police arrived the defendant attempted to identify himself by producing a driver's license and insurance card belonging to Mr. Plath. He attempted to explain the possession of these by stating that he had purchased them from an individual named "Buster" who lived in his neighborhood, but admitted that although he had known Buster for two years he did not know Buster's real name or where he lived.

The defendant's alibi was that he was home in bed at the time of the robbery. It was stipulated by the parties at trial that the defendant's mother would corroborate this if she were called to testify.

In our view the totality of the evidence is more than sufficient to establish guilt beyond a reasonable doubt. It placed the defendant at the scene of the crime and established that he was in possession of the fruits of it within a short time afterward. The evaluation of the credibility of witnesses and weight of evidence are matters for the trial court and we will not substitute our judgment for that of the trier of fact. (People v Novotny (1968), 41 Ill.2d 401, 244 N.E.2d 182.)

For the foregoing reasons the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO, P. J., and

JOHNSON, J., CONCUR.

(Abstract only)

58297

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

MITCHELL PATTERSON,
Defendant-Appellant.



) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
)

) HON. ANTHONY J. BOSCO,
) JUDGE PRESIDING.
)

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Mitchell Patterson, was charged with possessing live ammunition without a Firearm Owner's Identification Card, in violation of Section 2 of the Firearms and Ammunition Act. (Ill.Rev.Stat.1969, ch. 38, par.83-2.) He was found guilty after a bench trial and sentenced to one year probation, the first thirty days to be served in the House of Correction.

The only issue raised by this appeal is whether the trial court erred in denying the defendant's motion to suppress admission of the ammunition. He contends that it was the product of an illegal search and seizure in that the arresting officer lacked probable cause to stop and frisk him.

The hearing on the motion to suppress was held immediately prior to the trial. The defendant testified that on April 20, 1970, at about noon, he was walking near 64th Street and Kenwood carrying a briefcase which contained the ammunition. He and four or five other people were accompanying an old man who was drunk, and they were "trying to straighten him out." Several police officers in squad cars pulled up and ordered the defendant and his companions to get up against a fence. The officers then searched them. One of the officers took the defendant's briefcase from him and "found the bullets" inside.

Don McMahon, the arresting officer, testified that he went to 64th and Kenwood in response to a call on his radio concerning an armed robbery in progress. When he arrived he observed the defendant and four other men against a fence being searched by police officers. Another man was sitting on the ground. McMahon took the defendant's briefcase from him and placed it on the hood of the squad car. As he did so some bullets fell out. He then opened the case and found other bullets, 57 in all. He asked to see the defendant's Firearm Owner's Identification Card, and when the defendant stated that he did not have one, he arrested him.

In the now well known case of Terry v. Ohio (1968), 392 U.S. 1, the United States Supreme Court recognized that under certain circumstances a police officer may be justified in detaining a person for the purpose of determining whether a crime is being committed. In such a case the officer need not possess information which would establish probable cause for the individual's arrest in order to conduct a protective search for weapons. He need only possess a reasonable belief that his safety or that of another is in danger.

In the present case Officer McMahon and the other officers who converged on the vicinity of 64th and Kenwood received information that an armed robbery was in progress involving a group of male Negroes. The testimony of the defendant indicates that the first officers on the scene were confronted by the sight of five young men surrounding one old man who was drunk. This, coupled with the radio call, was sufficient to raise a reasonable suspicion that the five might be in the process of committing a robbery and that an investigation should be made. Part of the radio message was that the subjects were armed. This justified a protective search for weapons.

When Officer McMahon arrived on the scene, the other officers were conducting the protective search. Another officer was frisking the defendant. The testimony is not entirely clear, but it appears that the defendant was either holding the briefcase in his hand or that it was lying on the ground at his feet.

Nothing in the record indicates whether the briefcase was of sufficient size to conceal a weapon. If it had been the circumstances would have justified the officers in searching it. This question is not before us, however, because, as Officer McMahon testified, some of the bullets fell out as he placed the case on the hood of the squad car. The defendant did not refute this testimony directly, and, in addition, the court specifically found that the testimony of the defendant was incredible and that of the officer was believable. In assessing the credibility of witnesses we will not substitute our judgment for that of the trial court.

With respect to the bullets that fell out of the case, there was actually no search, as the officer observed objects that were in plain view. (See People v. Pickett (1968), 39 Ill.2d 88, 233 N.E.2d 560.) With respect to the bullets that remained in the case and were discovered by Officer McMahon upon opening it, the bullets that fell out established probable cause for the search.

For the foregoing reasons we conclude that the officers were justified in detaining the defendant initially and that the chain of events which led ultimately to the discovery of the ammunition did not violate any constitutional principles. It follows, therefore, that the trial court was correct in denying the motion to suppress, and its judgment of conviction will be affirmed.

Affirmed.

ADESKO, P.J., and DIERINGER, J.,

CONCUR.

(Abstract only)



PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JIMMY BROWN,

Defendant-Appellant.

)
)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)

)
) HON. PHILIP ROMITI,
) JUDGE PRESIDING.
3D
17 I.A. 263

Mr. JUSTICE BURMAN delivered the opinion of the court.

Jimmy Brown, the defendant, was charged with four counts of aggravated assault and two counts of unlawful use of a weapon. After a bench trial, the Circuit Court of Cook County found him guilty on two of the four aggravated assault charges and sentenced him to terms of three to five years in the penitentiary on each, the sentences to run concurrently. The court also found him guilty on one of the unlawful use of a weapon charges and sentenced him to three to six years in the penitentiary, the sentence to run concurrently with those imposed on the aggravated assault charges.

The defendant prosecuted an appeal to this court, under docket number 57240, in which he contended that he was not proven guilty beyond a reasonable doubt of one of the aggravated assault charges, that two concurrent sentences on the offenses of aggravated assault were improper because both arose from the same conduct and that the sentence imposed on the unlawful use of a weapon charge was improper. On August 3, 1973, this court rendered an opinion in which it affirmed both convictions for aggravated assault, but vacated the sentence as to one. It also vacated the other sentences, finding that the defendant was entitled to the benefits of the Unified Code of Corrections, which went into effect January 1, 1973, and remanded the cause for resentencing.

In March, 1972, while the above appeal was pending, the defendant filed a pro se petition for post conviction relief, and in January, 1973, a supplemental petition. It was alleged that he was taken into custody illegally, that he was mistreated and denied

contact with his family while in jail, that he was not given the warnings required by Miranda v. Arizona (1966), 384 U.S. 436, and that he should have received only one sentence on the aggravated assault charges. A hearing was had on March 6 and March 22, 1973, after which the court dismissed both the original and supplemental petitions on motion of the State. The defendant instituted the present appeal from the order of dismissal on April 7, 1973, and the Public Defender was appointed to represent him.

On August 29, 1973, the Public Defender filed a motion in this court requesting leave to withdraw as defendant's counsel on the ground that the present appeal is without merit and could not possibly be successful. Pursuant to the holding in Anders v. California (1967), 386 U.S. 738, he filed a brief in support of his motion in which he stated that, in his view, the defendant waived the matters raised in his petitions by not raising them in his original appeal and that the question whether he should have received one or two sentences on the aggravated assault charges is res judicata, having been decided by this court previously in cause number 57240.

After reviewing the record, we are inclined to agree with the Public Defender. It is well established that all issues that are known to defendant or his counsel and are not raised on appeal, are waived. (People v. Kamsler (1968), 40 Ill.2d 532, 240 N.E.2d 590.) We have found nothing in the present case that would indicate that the issues raised in the petitions were not known to the defendant at the time of his original appeal and could not have been raised at that time. Furthermore, the allegations concerning the circumstances of the defendant's arrest and confinement are immaterial to the validity of his convictions, as the convictions are not based upon any statement made by him while in custody.

The Public Defender served a copy of his motion upon the defendant prior to filing it. In addition, we notified the defendant of the motion in a letter dated August 31, 1973. In the same letter we gave the defendant until October 19, 1973, to file any additional information in support of his appeal. We informed him that after said date we would make a full examination of all of the proceedings and that if we found that the appeal was without merit we would grant the Public Defender's motion and would affirm the trial court's order without further appointment of counsel.

For the reasons stated above we have concluded that the present appeal is wholly frivolous. The motion of the Public Defender for leave to withdraw is granted, and the order of the trial court dismissing the defendant's petitions for post conviction relief is affirmed.

AFFIRMED; MOTION FOR LEAVE TO WITHDRAW GRANTED.

ADESKO, P. J., and

DIERINGER, J., concur.

(Abstract only)

16-14
4th floor
in a room



55768

MICHAEL J. MACK,)	
)	
Plaintiff-Appellant,)	
	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
FRANCES CZERNIAK, formerly known	)	Samuel B. Epstein, J.
as FRANCES MACKNAKOWSKI and)	
FRANK CZERNIAK,)	
)	
Defendants-Appellees.)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

This is a dispute between a brother and sister over real property formerly owned by their parents. The brother, Michael Mack, appeals from the dismissal of his complaint which sought to impose trusts on two parcels of real property and to obtain an injunction barring prosecution of a forcible detainer action by his sister, Frances Czerniak. The trial court granted the sister's motion to dismiss the complaint on the ground that Michael was guilty of laches in bringing his action.

On October 1, 1944, a lot located at 3600 South Rockwell, Chicago, was acquired by Anthony and Frances Macknakowski, the parents of Michael and Frances. According to Michael's complaint, at the time of the purchase legal title was placed in the name of his youngest sister, Frances, who was to hold the property for the sole benefit of the parents. The purchase price was paid by the parents in part from personal loans from Michael and another sister, with the remainder provided by a mortgage loan secured by a trust deed.

The building in which the parents lived was located on the front part of the lot; the building also contained an apartment where Frances lived. She paid rent to her parents prior to her marriage in 1950 to Frank Czerniak. Subsequent to that date she and her husband lived in the apartment and continued the rental payments.

In 1948 Michael and his parents entered into an agreement which provided that if he constructed a residence for himself on the rear of the lot, that portion of the real estate would become his. Michael complied with the terms of the agreement. The building was erected and from 1949 to the present he has resided in the building and paid his share of the water bills and taxes.

Anthony and Frances Macknakowski both died intestate, the former in 1952 and the latter in March 1970. In June 1970 Michael demanded that the Czerniaks convey to him that portion of the real estate upon which his residence was situated. The Czerniaks refused to do so, and on July 2nd of that year they initiated a forcible detainer action to obtain possession of the property claimed by Michael. Thereupon Michael filed a complaint which sought a declaratory judgment that the Czerniaks held legal title to the front portion of the premises as trustees for the heirs of Anthony and Frances Macknakowski and that they held title to the rear portion as trustees for his benefit. He also sought an order commanding them to convey the rear portion to him, enjoining them from proceeding with the forcible detainer action against him, compelling them to pay his attorney fees and for other equitable relief.

The Czerniaks moved to dismiss the complaint on the grounds that it was barred by the statute of limitations and by laches, that the alleged agreement between Michael and his parents violated the statute of frauds and that no cause of action was stated. Following a hearing, the trial court dismissed the complaint solely because the plaintiff was deemed guilty of laches in bringing his action, and he was given 30 days to vacate the rear of the premises.

The plaintiff contends that the trial court erred in dismissing his complaint upon the ground of laches. He is correct in this contention. Moreover, the judgment can be reversed either on the merits or because the defendants have not filed an answering brief in this court. If an appellee does not defend his judgment on appeal, a court of review may reverse the judgment without considering the merits of the appeal. Ridge Manor Convalescent Home v. City of Chicago (1972), 4 Ill.App.3d 1077, 283 N.E.2d 272; Perez v. Janota (1969), 107 Ill.App.2d 90, 246 N.E.2d 42; Wieboldt Stores, Inc., v. Mautner (1965), 61 Ill.App.2d 368, 210 N.E.2d 597.

Laches is the neglect to assert a right or claim which, taken together with the lapse of time and circumstances causing prejudice to the opposite party, bars a complaint. Kadon v. Board of Fire & Police Com'rs (1964), 45 Ill.App.2d 425, 195 N.E.2d 751. Accepting as accurate the factual allegations in the plaintiff's complaint, it is difficult to see how Frances Czerniak or her husband was prejudiced by her brother's delay in asserting his ownership or in bringing his

action for declaratory judgment. If she owned all the property outright and was not holding it in trust, she was as much guilty of laches as he was. He built a home on the property and resided there for over 20 years without a request being made or legal action taken by her to obtain compensation or possession. By paying water and tax bills he dealt with the property in a manner not customary for an individual not claiming ownership. If the facts in his complaint are true, much of the responsibility for his belated effort to legally establish ownership rests upon the Czerniaks for their own inaction in the past. At a trial on the merits the plaintiff will bear the burden of establishing his right to that portion of the property he occupies and the right of the descendants of his parents to the balance of the property. Any disadvantage due to lack of promptness on his part will rest more heavily upon him than upon the defendants.

The order dismissing the complaint is reversed and the cause is remanded.

Reversed and remanded.

McNamara, P.J., and McGloon, J., concur.

56132



171A.265^{3D}

PEOPLE OF THE STATE)
OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
WILLIE RANGE, Jr., and)
JAMES D. ELLIS,)
)
Defendants-Appellants.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
SAUL A. EPTON,
Presiding.

Mr. JUSTICE MEJDA delivered the opinion of the court.

An indictment charging two counts of burglary on November 17, 1970, was returned against both defendants. One count charged defendants with entering the apartment of Albert P. Causey, and the other count charged defendants with entering the apartment of Gertrude Miller, each with the intent of committing thefts therein. Defendants were tried jointly without a jury and found guilty on both counts. Willie Range, Jr. was sentenced to serve four to eight years, and James D. Ellis to serve one to two years. Defendants appeal.

Defendants contend (1) that oral statements given to the police were erroneously admitted into evidence without proof of adequate advisement and waiver of the right to remain silent; (2) that a document was erroneously admitted as to the constitutional warnings given by the police; and (3) that the evidence at trial as to the burglary of the apartment of Albert P. Causey is at fatal variance with the allegations of the indictment. These contentions require a review of the pertinent evidence.

Detective Elbert Banks, an investigator with the Chicago Police Department, testified that on the morning of November 20, 1970, he received an assignment to investigate a burglary

complaint in an apartment building located at 4421 South Calumet Avenue in the City of Chicago. Upon arrival at the building prior to 11:00 A.M., on the said date, he was informed by the housekeeper, Mrs. Zettie Glass, that she had seen the defendants, Willie Range, Jr., who lived on the second floor, and James Ellis, carrying some merchandise from the building and that she recognized one piece as similar to the picture Reverend Causey had in his room. Mrs. Glass then led Banks up to the second floor of the building where defendant Ellis was found sitting alone in a common kitchen area. Banks further testified that he stated to Ellis that he was there in regard to a burglary investigation and read to Ellis his constitutional rights from a calendar card he carried; that after reading these rights he asked Ellis if he wished to discuss the alleged burglaries and Ellis answered that he did; and that thereupon Ellis admitted his participation with defendant Range in the two burglaries. Banks stated that Ellis informed him defendant Range could be found at another address and that Range could provide information as to what had happened to the missing items of property.

Banks further testified that later the same day he and Detective Dolniak went to the address where Ellis had said Range could be found; that Range was located in an apartment there with a woman friend, and in the woman's presence he informed Range that he was there in regard to an investigation of a burglary which occurred at 44th and Calumet, and read to him the same constitutional rights he had read to Ellis. Banks stated that after Range acknowledged his understanding of the rights which had been read to him he admitted to participating with Ellis in the burglaries and subsequently pawning the stolen items.

Defendant Ellis testified that he was questioned by Banks in his own apartment rather than in the common kitchen; that after he told Banks his name, Banks placed him under arrest for burglary; that shortly thereafter Banks searched his apartment without his consent and never informed him of any constitutional rights. Ellis denied that he gave any statement to Banks which admitted his participation in the burglaries.

Mrs. Zettie Glass testified that Range and Ellis lived in the building on the second floor and that she had seen both men leave the building on November 17 with something the size of a picture and something in a paper bag; that although she was in and out of the immediate area where Banks and Ellis were talking, she could not recall any of the substance of their conversation.

The defendants objected to Banks' testimony as to the substance of the defendants' admissions on the basis that no evidence was presented of a valid waiver of their right to remain silent. The trial court overruled this objection. The underlying premise of the defendants' contention that the trial court erred in admitting testimony as to their statements to the police in the absence of evidence of a valid waiver of their rights is that these statements were the result of a custodial interrogation. The record does not support that premise.

The sine qua non of the procedural protections against self-incrimination established in Miranda v. Arizona (1965), 384 U.S. 436, is not that suspicion has been focused upon a particular accused, but that the accused is subjected to interrogation by officers after he has been taken into custody or otherwise deprived of his freedom of action in any significant way. People v. Fischetti (1970), 47 Ill.2d 92; U.S. v. Sicilia, 475 F.2d 308 (7th Cir. 1973).

In the Fischetti case, three policemen entered the apartment of the parents of the defendant to execute a search warrant for narcotics on the person and belongings of defendant's brother. While the parents were elsewhere in the apartment the defendant and his brother remained in the brother's bedroom which the police were searching. One officer discovered a packet of marijuana in a coat in the bedroom closet and inquired as to its ownership. The defendant replied that the coat was his, although the officer testified that he could not recall whether he informed the defendant of finding the marijuana before he inquired as to the ownership of the coat.

The defendant was then arrested for possession of marijuana, and at his trial his statement of ownership of the coat was admitted into evidence over the objection that he had not been warned of his right to remain silent. Upon appeal of the conviction the Illinois Supreme Court held that even if the defendant had become the focus of suspicion, the questioning involved was of a limited duration, occurred prior to arrest, and was conducted in the familiar surroundings of the parents' home; and that such did not constitute a deprivation of defendant's freedom of action in any significant way. Therefore, the police need not have apprised the defendant of his right to remain silent, and his statement was admissible, notwithstanding the lack of any warnings. But cf. Orozco v. Texas (1969), 394 U. S. 324.

In the Sicilia case, two FBI agents visited a cartage company of which defendant was chief executive, in response to an informer's tip that a fork lift truck stolen from an interstate shipment could be recovered there. While in defendant's office the agents told him the purpose of their visit and in answer to their inquiries defendant informed them that he had recently purchased a similar fork lift truck.

The defendant agreed to allow the agents to examine this vehicle. Upon discovering that the truck was the same one which had been stolen, the agents returned to defendant's office and informed him of his constitutional rights. At trial, defendant's motion to suppress his original statement to the agents was granted on the basis that it was given without a prior advisement as to his right to remain silent. The Court of Appeals, in reversing the order of suppression, held that since the brief initial questioning by the agents was conducted within the familiar confines of defendant's own office and at a time when he was neither under custody nor deprived of his freedom of action in any significant way, the agents need not have advised him of his right to remain silent prior to their initial questioning.

In the instant case there is no conflict in the evidence concerning the events surrounding defendant Range's first encounter with Detectives Banks and Dolniak. The conflicts in the testimony of Banks and defendant Ellis as to their first encounter were resolved by the trial court's inferential determination that the credibility lies with Banks. The determination by the trial court is not manifestly against the evidence and therefore will not be disturbed on review.

People v. Kalagian (1972), 6 Ill.App.3d 582.

Banks did not testify that either defendant was placed under arrest prior to making the admissions concerning the burglaries. Ellis was questioned briefly by one plainclothes policeman in the confines of his own apartment or immediately adjacent thereto. Range was questioned by two plainclothes policemen in the apartment of a woman friend and in her presence. Banks did not testify that either defendant during those periods of questioning was under any limitation as to

his freedom of action. The fact that Banks initially informed each as to his right to remain silent is not—in and of itself—indicative of any restraint upon their freedom of action. We can only attribute such to an abundance of procedural caution with which Banks performed his duties. U.S. v. Sicilia, supra.

The record in this case does not support the conclusion that the statements given to the police by the defendants were the products of custodial interrogations. The objection that these statements were admitted without a prior showing of a waiver of the defendants' constitutional rights fails as a result.

The defendants next contend that the trial court erred in admitting into evidence a calendar card containing the so-called Miranda warnings which Detective Banks had used to refresh his recollection of the specific constitutional warnings he had given the defendants. Banks testified that this card was only similar to the one he read to the defendants, and defendants now assert that its admission into evidence violated the best evidence rule and our business records statute. Ill.Rev.Stat. 1969, ch. 38, par. 115-5(c)(2). The objection grounded upon the business records statute was not presented at trial and therefore cannot be considered on appeal. People v. Sinclair (1963), 27 Ill.2d 505. The objection to the admission of this card upon the basis that such would violate the best evidence rule was made at trial. However, since we have determined that no custodial interrogations were here involved, even if it is assumed that the admission of the card was error, we do not deem such error to be prejudicial to the defendants. People v. Oparka (1969), 105 Ill.App.2d 158.

The defendants' final contention is that the testimony adduced at trial as proof of the possession of one of the bur-

glarized apartments is at fatal variance with the allegation of possession contained in one count of the indictment. The count in question alleges that defendants entered the apartment of Albert P. Causey with the intent to commit a theft therein, and the defendants concede the legal sufficiency of this count. Defendants maintain, however, that the testimony at trial establishes that the apartment referred to in this count was in the possession of a Bishop Causey. Resort to the trial record shows that the defendants' contention is without merit. During his direct examination by the prosecutor the witness identified himself as "Bishop A.P. Causey." He spelled his last name as "C-a-u-s-e-y" and gave his first name as "Bishop." Thereupon the prosecutor stated, "I thought it was Albert P. Ca[u]sey," and the witness replied, "That is my name." We conclude that there is no variance in the instant case.

For these reasons, the judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

McNAMARA, P.J., and DEMPSEY, J., concur.



No. 58094

H. KAUFMAN, d/b/a LINCOLN UPHOLSTERY	)	APPEAL FROM THE
COMPANY,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
Plaintiff,)	
)	
vs.)	
)	
ELEANOR HICKS,)	
)	
Defendant-Appellant,)	
	)	HONORABLE
and	)	JOHN A. OUSKA,
	)	PRESIDING.
SOUTH SHORE NATIONAL BANK OF CHICAGO,)	
)	
Garnishee Defendant-Appellee.)	

Mr. JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal by the defendant, Eleanor Hicks, from an order of the trial court vacating and dismissing a portion of a garnishment judgment entered against the garnishee-defendant, South Shore National Bank of Chicago, affecting the defendant's funds on deposit there. After a hearing on defendant's motion to vacate the judgment the trial court found that the total amount of \$66.02 withheld from her bank account, all but \$15 should be returned to the defendant, as the \$66.02 originally withheld consisted entirely of public assistance disability benefits not subject to garnishment by reason of Ill.Rev.Stat. 1971, ch.23, par.11-3. In this appeal the defendant alleges that it was error for the trial court to deny her motion to return to her the remaining \$15 withheld by the garnishee-defendant as "service charge" and "attorney's fee", as it also consisted solely of public assistance disability benefits. The garnishee-defendant has not appeared or filed briefs in this court in support of the judgment of the trial court.

We reverse.

The trial court proceedings that gave rise to this appeal are as follows: In January, 1972 the plaintiff, H.

Kaufman, d/b/a Lincoln Upholstery Co., obtained a confession judgment against the defendant and began garnishment proceedings against the garnishee-defendant bank in order to collect that judgment. In response to these proceedings the bank withheld \$66.02 from the defendant's bank account, \$15 of which consisted of "service charges" and "attorney's fees", leaving \$51.02 for the use of the plaintiff.

In April, 1972, the confession judgment was opened and all garnishment proceedings were stayed. In May, a hearing was held on defendant's motion to vacate the garnishment judgment at which time it was proven that the defendant was disabled and her sole source of income was public assistance disability benefits of which the garnished funds were part.

On the basis of these facts the trial court found the entire \$66.02 withheld from the defendant's account consisted solely of public assistance benefits and ordered that \$51.02 of that total be returned to the defendant as it was exempt from garnishment under Ill.Rev.Stat. 1971, ch.23, par.11-3. At the same time the trial court denied the defendant's motion to order the garnishee-defendant bank to return to the defendant the \$15 "service charge" imposed by the bank.

The defendant here contends that the \$15 diverted from her account by the bank is similarly protected from alienation by the statute and must be recredited to her account. Ill.Rev.Stat. 1971, ch.23, par.11-3 provides that: "All financial aid given under Articles III, IV, V, VI and VII shall be absolutely inalienable by assignment, sale, attachment, garnishment or otherwise." The defendant, being a disabled person, was apparently receiving benefits under Article III of the Public Aid Code.(Ill.Rev.Stat. 1971, ch.23, par.3-1 et seq.)

An examination of the annotated statutes reveals that there are no cases that have specifically interpreted the above section of the Code, however, it is a rule of statutory construction in this State that the words of the statute will be

given their ordinary and common meaning. "It is well settled that, in the absence of statutory definitions indicating a different legislative intention, the courts will assume that words have their ordinary and popularly understood meanings." (Farrand Coal Co. v. Halpin (1957) 10 Ill.2d 507, 510, 140 N.E.2d 698.) To the same effect is People ex rel. Kearns v. Busse (1910) 155 Ill.App. 613. In Fowler v. The Johnston City & Big Muddy Coal & Mining Co. (1920) 292 Ill. 440, 127 N.E.31, the court said at 452: "A court has no right to say that the legislature did not mean what in plain language it said."

An application of these rules of construction to the language of the statute leads us to agree with the defendant that the admonition of the statute precludes an interpretation of par.11-3 that would permit the garnishee-defendant bank to impose such a service charge on the defendant's public assistance benefits. Surely, by the use of the word "garnishment" in the statute the legislature also intended to protect all public assistance funds that would be alienated as costs or fees resulting from an attachment or garnishment proceeding. Were we to hold otherwise, we would be required to read into the statute an exception that is certainly not apparent from the clear prohibition contained therein. To interpret par.11-3 as not prohibiting the alienation of public assistance funds by means of bank "service charge" or "attorney's fee" pursuant to a garnishment proceeding would be to fail to give effect to the plain meaning of the language. No matter how the charge is labeled there is here a diversion of public assistance benefits that is prohibited by the statute.

Other courts, interpreting similar state and federal statutes, have also reached the conclusion that where the statutory prohibition against involuntary alienation is clear, public funds, such as public assistance and pension payments, are not alienable by court process for even the most just purpose. In Philpott v. Essex County Welfare Board (1973) 409 U.S.

413, the Supreme Court held that under 42 USCA 407 the petitioner's lump sum retroactive social security disability award deposited in a local bank could not be reached by any legal process even where the State of New Jersey held a signed agreement from the petitioner agreeing that he would repay the state for the interim public assistance benefits provided by it. In Ogle v. Heim (1968) 69 Cal.Rptr. 579, 442 P.2d 659, the court held that the plaintiff-wife could not compel an auditor-controller to honor an execution of judgment for child support from the retirement benefits of her judgment-debtor husband because of a state statute prohibiting the involuntary alienation of a public employee's pension fund. See also, Consumer Credit Corp. v. Lewis (1970) 313 NYS2d 879, 63 Misc.2d 928; and Guardian Loan Co. of Plainfield v. Baylis (1970) 112 N.J. Super. 44, 270 A.2d 304. Accordingly, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

McNamara, P.J. and Mejda, J., concur.



No. 58806

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
)
vs.) COURT OF COOK COUNTY.
)
ALVIN M. BALLARD,) Hon. Irwin N. Cohen,
) Presiding.
Defendant-Appellant.)

PER CURIAM:

Following a bench trial in the circuit court of Cook County, the defendant, Alvin M. Ballard, was convicted of failure to possess a State firearm owner's identification card (Ill.Rev. Stat. 1971, ch.38,par.83-2) and placed on probation for one year. Defendant was also convicted of failure to register a firearm with the city collector of the City of Chicago in violation of chapter 11, section 1.7 of the Municipal Code of the City of Chicago and fined \$25. Defendant contends he was not proven guilty beyond a reasonable doubt because the State's evidence did not rebut or contradict his testimony that he took the gun from another person, thus establishing the defense of "necessity" under Ill.Rev.Stat. 1971, ch.38,par.7-13.

Chicago Police Officer Witt testified that on August 13, 1972, about 9:30 in the evening, he observed a large group of teens standing on the street and he approached to interview them. As far as he knew, there was no dispute or argument among the teenagers. When he was about ten feet away from the defendant, he observed what appeared to be the butt of a revolver sticking out of defendant's right front pocket and he placed the defendant under arrest, searched him and recovered a .22 caliber revolver. The defendant said he did not possess either a State or City firearm owner's identification card and after the officer informed him of his constitutional rights, the defendant said that the revolver was not his, that "someone asked him to hold it."

The defendant, Alvin M. Ballard, testified he took the gun from another boy a minute or two before the police arrived

because he "didn't want to see anyone get hurt" and stuck it in his pocket. He said the boy was not one of his friends, that somebody else pulled a gun on the boy who in turn pulled the gun on them. On cross-examination, he testified the boy was "still there" when the police arrived, but when questioned whether he told the officer he had just taken the gun from someone, defendant answered that the police "wouldn't let me say anything."

Since the police officer testified that the defendant admitted that "someone" had asked him to hold the gun, this contradicted defendant's testimony and a question of credibility was presented, which the trial judge resolved against the defendant. However, even if defendant's testimony were to be accepted, a similar contention was presented and rejected in People v. Warlick (1973), 13 Ill.App.3d 276, 278, 300 N.E.2d 834, where the court stated:

"Defendant cites no case law for his proposition that his belief that someone would get hurt -- without more -- is the type of necessity for concealment contemplated by chapter 38, paragraph 7-13. Defendant, here, has not made a prima facie showing of necessity to conceal. See People v. Dalton (1972), 7 Ill.App. 3d 442, 287 N.E.2d 548."

Under the circumstances, the evidence proved the defendant guilty beyond a reasonable doubt and his testimony did not make out a defense of necessity.

The record reveals that a copy of the notice of appeal and copies of briefs were not served on the City of Chicago. Defendant has, therefore, not properly perfected an appeal from the City charge of failure to register a firearm with the city collector of the City of Chicago as required by Supreme Court Rule 303(d). Accordingly, the defendant's appeal from his conviction on the City charge in violation of the Municipal Code of the City of Chicago must be dismissed. People v. Claudio (1973), 13 Ill.App.3d 537, 539, 300 N.E.2d 791.

Defendant's appeal from the conviction for violation of the Municipal Code of the City of Chicago is dismissed for failure to comply with Supreme Court Rule 303(d), and the

judgment of the circuit court of Cook County, convicting the defendant on the charge of failure to carry a State firearm owner's identification card, is affirmed.

Affirmed in part;
dismissed in part.

Third Division. JUSTICE MEJDA did not participate.



17 I.A. 276^{3D}

No. 58901

MERCURIO N. ODDO, et al.,)	
)	
Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT
)	
vs.	)	COURT OF COOK COUNTY.
)	
WESTERN SAVINGS AND LOAN	)	Hon. James J. Mejda,
ASSOCIATION,	)	Presiding.
)	
Defendant-Appellee.)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Plaintiffs, individually and as representatives for all similarly situated borrowers, filed a class action in the circuit court of Cook County alleging an unlawful banking practice engaged in by Western Savings and Loan Association and all other savings and loan associations authorized to do business in Illinois. Western Savings moved to dismiss the complaint, and the trial court granted the motion. Plaintiffs appeal.

The complaint, in three counts, averred that the actions of Western Savings in inserting a clause in their mortgages exacting monthly prepayment charges of the borrowers' estimated annual real estate taxes and insurance premiums and in commingling the prepayments with their general assets and investing them without any interest or earnings accruing to the borrowers constituted a breach of duty, a deceitful practice, and an unconscionable activity. The complaint further demanded a full accounting from Western Savings and the other savings and loan associations.

On September 29, 1966, plaintiffs obtained two loans from Western Savings, one for \$55,000 and the other for \$15,000. As consideration for the loans, plaintiffs executed a promissory note, secured by a mortgage on their real estate. One provision in the mortgage required plaintiffs to pay to Western Savings in monthly installments one-twelfth of the estimated annual real estate taxes and insurance premiums covering the mortgaged property. The estimate would be made by Western Savings, and in the event the estimate turned out to be higher than the charges actually incurred, Western Savings agreed to return the surplusage to plaintiffs, just as plaintiffs agreed

to make up any difference caused by an underestimate of the annual assessments. The mortgage also contained a clause detailing what Western Savings would do upon receipt of the prepayments, which read in relevant part as follows:

It is agreed that all such payments may, at the option of the Association (1) be held in trust by it without earnings for the payment of such items; (2) be carried in a borrower's tax and insurance account and withdrawn by the Association to pay such items; or (3) be credited to the unpaid balance of said indebtedness as received, provided that said items as the same accrue and become payable. If such sums are held in trust or carried in a borrower's tax and insurance account, the same are hereby pledged together with any other account of the undersigned in the Association to further secure this indebtedness and any officer of the Association is authorized to withdraw the same and apply thereon.

The trial court granted Western Savings' motion to dismiss the complaint on the grounds that it failed to state a cause of action.

We initially observe that plaintiffs have failed to argue in this court any of the theories upon which their complaint was grounded. Instead they have devoted their entire brief to seeking a reversal on a new theory, that the facts alleged established the necessary prerequisites for quasi-contractual relief. Our usual procedure is to consider the abandoned grounds waived for purposes of appeal. (Rudolph v. Gersten (1968), 100 Ill.App.2d 253, 241 N.E.2d 600.) However, we have decided to exercise our discretion and consider the issues raised by the complaint.

The first count of the complaint charged that Western Savings' practices constituted a violation of their "duties and obligations" owed to their borrowers. Although plaintiffs do not articulate what these duties are, they claim that any earnings gained by Western Savings through its use of the prepayments amounted to a breach of the purpose for which the prepayments were exacted and, therefore, may be deemed an unlawful appropriation.

If Western Savings bore any legal duty to segregate the

assets and to pay interest or earnings for the use of plaintiffs' payments, such a duty would presumably be founded on either trust or contract law. This court recently has been faced with the issue of whether language almost identical to that employed in the present case could be construed to create a trust relationship, and has held that it can not. (Sears v. First Fed. Sav. and Loan Assoc. (1971), 1 Ill.App.3d 621, 275 N.E.2d 300, leave to appeal den. 1972, 49 Ill.2d 577.) We concur in the court's reasoning and adhere to its conclusion. Nor do we believe that plaintiffs' position can be sustained on a bilateral contract theory. The agreement between the parties, fully supported by consideration, does not provide, either expressly or implicitly, for the segregation of the assets and accrual to the borrowers for earnings or interest. The Sears opinion is also helpful on this issue because it stated that the prepayments should be characterized as simply payments by a debtor of amounts due to a creditor, rather than deposits in a legal sense. The court found that the payments were essentially unconditional, and that the borrowers retained no specific property rights in any of the sums thus paid. We conclude, therefore, that the trial court correctly dismissed count one of the present complaint.

In their second count plaintiffs charged that the actions of Western Savings, as shown by the mortgage provision, were deceitful. However, no specific facts were alleged to support this conclusion. To maintain an action for deceit, a plaintiff must allege that defendant made a false representation of a material fact with the intent to induce reliance, that plaintiff did in fact reasonably rely on it, that defendant knew or had reason to know of the falsity of the representation, and that plaintiff suffered actual damage as a result. (Roda v. Berko (1948), 401 Ill. 335, 81 N.E.2d 912; Welch v. Brunswick Corp. (1973), 10 Ill.App.3d 693, 294 N.E.2d 729.) Where a complaint recites only general conclusions of fraud or deceit and fails to plead the necessary facts in support of its allegation, a

motion to dismiss the complaint will be sustained. (Bacon v. Village of Oak Lawn (1961), 33 Ill.App.2d 224, 178 N.E.2d 140.) The trial court properly dismissed the second count of the complaint.

Plaintiffs' final count alleged that the mortgage provision and resultant actions by Western Savings were "unconscionable, oppressive, and offensive" and hence should be deemed wrongful and unlawful. Again, plaintiffs have failed to set forth specific facts to support their conclusions. Since the count was insufficient in law, the dismissal order was proper. (Adams v. J. I. Case Co. (1970), 125 Ill.App.2d 388, 261 N.E. 2d 1.

In this court, plaintiffs contend that the complaint was proper because the facts alleged established the necessary prerequisites for relief under a theory of quasi-contract or unjust enrichment. Since this issue was not raised in the trial court or set out in the complaint, it cannot be raised for the first time on appeal. Benson v. Isaacs (1961), 22 Ill. 2d 606, 177 N.E.2d 209.

For the reasons stated, the order of the circuit court of Cook County dismissing plaintiffs' complaint is affirmed.

Order affirmed.

DEMPSEY and MCGLOON, JJ., concur.

59487



171A^{3D} 315

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellant,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
DAVID WHITE,	)	HONORABLE
	)	JAMES MURPHY,
Defendant-Appellee.	)	PRESIDING.

MR. JUSTICE ENGLISH delivered the opinion of the court:

The State seeks to appeal a pre-trial order of December 4, 1972, suppressing certain evidence pertaining to this case. Defendant has moved to dismiss the appeal on the ground of non-compliance with Supreme Court Rule 608(c) and (d) (Ill. Rev.Stat. 1971, ch. 110A, par. 608(c) and (d)), relating to the time limits for filing the record in this court.

The State filed a timely notice of appeal on December 22, 1972, well within the 30-day period provided for by Rule 606(b). Ill.Rev.Stat. 1971, ch. 110A, par. 606(b).

As to the filing of the record, the pertinent parts of Rule 608 provide:

(c) Time for Filing Record on Appeal. The record shall be filed in the reviewing court within 63 days from the date the notice of appeal is filed in the trial court ***. *** If the time for filing the report of proceedings has been extended, the record on appeal shall be filed within 14 days after the expiration of the extended time.

(d) Extensions of Time. Before the expiration of the applicable time, any judge of the trial or reviewing court may extend the time for filing the report of proceedings in the trial court or the record in the reviewing court. An extension of time may also be granted by the judge on motion, supported by a showing of reasonable excuse for failure to file the motion earlier, made within 35 days after expiration of the applicable time or within six months of the expiration of the original 30 days allowed for filing a notice of appeal, whichever is later.

(Emphasis supplied.)

Since the time for filing a Report of Proceedings was not extended pursuant to paragraph (c), the record could have been filed in this court under the Rule's basic schedule on or before February 23, 1973. This was not done.

As appears from the emphasized portion of paragraph (d) of the Rule, the trial court could have extended the time for filing the record by order(s) entered "before the expiration of the applicable time." This was not done.

Or, if a reasonable excuse could have been shown, the State might have applied for extension(s) of time to file the record on motion made "within 35 days after the expiration of the applicable time." This was not done.

Or, finally, an extension could have been granted to the State on showing of a reasonable excuse, "within six months of the expiration of the original 30 days allowed for filing a notice of appeal," namely, by July 2, 1973 (within six months after January 3, 1973). This was not done.

A month later, on August 2, 1973, the State did seek an extension of time from the trial court, and an order was entered purporting to extend the time to file the record until September 6, 1973, and the record was filed on September 5, 1973. But by August 2 the trial court had lost all jurisdiction to enter such an order.

While the Supreme Court may well have the authority to permit departures from the strictures of its own rules, this court is without authority so to do.

Defendant's motion to dismiss this appeal is therefore allowed.

APPEAL DISMISSED.

LORENZ and SULLIVAN, JJ., concur.



57438

LORETTA C. ANDRES,)	
)	
Plaintiff-Counterdefendant	)	APPEAL FROM THE
-Appellant,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
)	
PAUL ANDRES,	)	HONORABLE EDWARD E. PLUSDRAK,
	)	HONORABLE ROBERT L. HUNTER,
Defendant-Counterplaintiff	)	JUDGES PRESIDING.
-Appellee.)	

Mr. PRESIDING JUSTICE EGAN delivered the opinion of the court:

On June 15, 1970, the plaintiff, Loretta Andres, brought this action for separate maintenance. On June 30, 1970, the defendant, Paul Andres, counterclaimed for divorce on the grounds of desertion and adultery. After consultation with counsel, a tentative settlement was reached. The plaintiff, however, later rejected the settlement and obtained an order for temporary alimony.

On September 3, 1970, the defendant moved to vacate the temporary support order and requested a hearing on whether the plaintiff had probable cause for her action. Notice was given that plaintiff's deposition was to be taken on September 24, 1970, and a hearing was set sometime after that date. She failed to appear for her deposition, and it was reset for October 22, 1970. The hearing was continued.

The plaintiff again failed to appear for her deposition on October 22, 1970, and on November 12, 1970, and it was reset for November 19, 1970. The hearing and the rule to show cause against the defendant were reset for December 19, 1970. On November 30, 1970, the plaintiff was served with an interrogatory consisting of one question. On December 10, 1970, the defendant's petition to vacate was denied, and the petition for rule to show cause was continued to January 26, 1971.

The interrogatory had not been answered by January 20, 1971, and on defendant's motion to require her to answer, the plaintiff was given until January 29, 1971. The hearing on January 26, 1971,

was reset for March 29, 1971. On March 11, 1971, on defendant's motion to require her to answer, the plaintiff was given 15 additional days. On March 26, 1971, an answer to the interrogatory was filed.

On August 4, 1971, the trial began. A settlement was reached before the trial concluded, and the parties proceeded on an oral agreement to amend the complaint for separate maintenance to one for divorce. The plaintiff failed to present a decree pursuant to the agreement. On September 17, 1971, the defendant moved to have the decree presented and signed. The plaintiff had apparently repudiated the settlement, and her counsel stated that on September 16, 1971, he had received a telegram from her that she was in the hospital. The case was continued on motion of the plaintiff's counsel.

On October 22, 1971, the plaintiff again failed to appear on the defendant's motion to have the decree signed. On November 10, 1971, the defendant moved to have his counterclaim heard as a contested matter; the case was continued to November 18, 1971, and then to December 7, 1971. On December 7, 1971, plaintiff did appear, but asked her counsel to withdraw. The trial court allowed the motion to withdraw and appointed an attorney from the Legal Aid Bureau to represent her. The plaintiff's newly appointed attorney moved for a continuance on the ground that he had insufficient time to prepare. The motion was denied and the trial commenced.

After hearing both parties, the court denied the complaint for separate maintenance and allowed the counterclaim for divorce on the grounds of adultery and desertion with alimony mutually barred and the proceeds of insurance policies divided equally. No question is raised of the sufficiency of the evidence to support the trial court's findings.

On December 17, 1971, the decree of divorce was presented to be entered. When the plaintiff's attorney objected to its entry,

the trial court offered to allow the plaintiff to present additional evidence on December 22, 1971.

On December 22, 1971, the plaintiff was recalled to present what additional evidence she had. She mentioned the names of several possible witnesses, but none was present. The judgment was reaffirmed and the decree entered on December 24, 1971.

The plaintiff first contends that the trial judge abused his discretion in refusing to grant her a continuance on December 7, 1971, in order to give her newly appointed attorney time to prepare. The granting or denial of a motion for a continuance is within the sound discretion of the trial court and absent a manifest abuse of that discretion a reviewing court will not interfere with the trial court's decision. (Parker v. Newman, 10 Ill.App.3d 1019, 295 N.E.2d 503.) The determinative factor in such cases is the degree of diligence exercised by the party seeking the continuance. Roberts v. McDaniel, 22 Ill.App.2d 485, 161 N.E.2d 47.

The case had been delayed from June 15, 1970, until December 7, 1971. Throughout that period the plaintiff's lack of diligence was exemplified by her failure on several occasions to appear at the hearings, by her failure to appear for depositions and by her failure to answer interrogatories. Moreover, the plaintiff was fully apprised that the trial court could "no longer tolerate any further continuances." In spite of this fact, the plaintiff insisted that her counsel withdraw. In Reecy v. Reecy, 132 Ill.App.2d 1024, 271 N.E.2d 91, relied on by the plaintiff, counsel was given leave to withdraw on his own motion, and, as the court emphasized, there was nothing in the record to show that the plaintiff voluntarily changed counsel. In this case, the plaintiff insisted that her counsel withdraw in the face of the trial court's statement that no further continuances would be granted. Moreover, the plaintiff herself did not request a continuance; but, rather, told the judge: "I am here because I must get rid of it [the case]."

I'm most anxious." While we can appreciate the plight of appointed counsel, under these circumstances we believe the trial court did not abuse its discretion by denying her motion for a continuance.

The plaintiff's second contention is that the trial court erred in refusing to furnish her with a free transcript. The record now before us indicates that on February 2, 1972, plaintiff requested a free transcript for appeal. Her request was denied. On April 20, 1972, plaintiff again moved for a free transcript. The trial court then granted her motion; and this appeal has been pursued with the benefit of a full transcript. The plaintiff's contention therefore is moot.

The judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

BURKE, J. and GOLDBERG, J. concur.

ABSTRACT ONLY.



No. 58591

LORETTA McCAFFREY ANDRES,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY
)	
v.)	
)	
HELEN M. McCAFFREY, JOHN)	
McCAFFREY and PAUL ANDRES,	)	HONORABLE
	)	NATHAN COHEN
Defendants-Appellees.	)	PRESIDING

PER CURIAM* (First District, Fifth Division):

Plaintiff appeals from a summary judgment in favor of all defendants in an action for specific performance and from the denial of her motion to vacate the summary judgment.

In 1959, plaintiff and her then husband, Paul Andres, co-defendant herein, purchased a combination rooming house, tavern and restaurant located on Fullerton Avenue (Fullerton) from Owen and Genevieve Rehart. In order to obtain the necessary down payment for Fullerton, the Andreses borrowed \$10,000.00 giving a mortgage on their private residence (Francisco), the subject property herein. The Reharts took back a first mortgage on Fullerton for the unpaid balance of the purchase. After purchasing Fullerton, the Andreses took up part time residence there, leaving the Francisco property in the care of plaintiff's mother and brother (defendants). In 1961, the Andreses lost their liquor license for Fullerton and encountered operating difficulties in respect to the property and, as a result, payments to the Reharts were stopped. Consequently, the Reharts foreclosed on their mortgage and, additionally, obtained a deficiency judgment against the Andreses for \$7,791.52 (January 18, 1962). The record further indicates that the Andreses were at the same time indebted to numerous other creditors.

* Justice English did not participate.

The Francisco property was held in a land trust and the Andreses assigned their beneficial interest therein to the defendants Helen and John McCaffrey on January 13, 1962. Upon learning of the assignment, the Reharts filed suit to set aside the conveyance alleging it was fraudulent. This suit was settled by the McCaffreys for \$1,000.

In June, 1970, plaintiff filed for divorce but her husband counterclaimed and obtained the divorce. In December, 1970, the instant action was filed, wherein plaintiff sought to compel the reconveyance to her and her former husband, defendant Paul Andres, by the McCaffreys and, because she was involved in divorce proceedings, she also asked for a sale of the property and a division of the net proceeds equally to her and her husband. Plaintiff asserted that the 1962 assignment was made without consideration and that the McCaffreys, therefore, became trustees of a constructive trust in her favor. Furthermore, she contended the transfer was for the purpose of holding title only and that no equity interest was to have been given those defendants.

All defendants moved for summary judgment claiming that plaintiff, in assigning the interest to the McCaffreys, was hiding the property from her creditors. In their accompanying affidavits, the defendants contended, inter alia, that because of the fraudulent conveyance, plaintiff had unclean hands and could not invoke the aid of equity. Initially the court denied the motion. However, upon learning that the Reharts' deficiency judgment was not satisfied by the settlement payment of the McCaffreys, the court granted summary judgment in defendants' favor. The plaintiff then moved to vacate the summary judgment and asked leave to file an amended complaint. The judgment was stayed and a hearing was held by the court to determine whether there were any additional

facts which might be the basis for vacating the judgment. The following testimony was then adduced at the hearing on the motion to vacate.

Plaintiff testified that the assignment to the McCaffreys was made pursuant to an agreement with them, wherein they would take care of all the debts owing by plaintiff and, as we construe the import of plaintiff's testimony, the interest assigned would remain with the McCaffreys if plaintiff failed to repay any monies paid by them on her behalf. The meeting at which the assignment was consummated was attended by all the parties herein. Plaintiff also testified that there was no intent on her part to defraud creditors by the assignment. However, on cross-examination she was impeached by her answers in a pretrial deposition that the property was assigned in order to "protect the property from the sheriff and the judgment that was against us, so that they couldn't take it away." Furthermore, on trial she admitted answering in her deposition that she and her husband made the transfer to "hide this property while we had a judgment against us so that later on we could have it." The record also discloses that defendants' counsel, in arguing the motion for summary judgment, read answers concerning the property assignment from a purported transcript of the testimony in her divorce suit as follows: "We gave it to a beneficial Trust just to hide it, so that we would have something [sic] at our age we are now." and "At that time my husband and I were going to remain together subject to the property coming back together when the judgment time is lifted." No objection was made to the reading of these answers, nor was a motion to strike made after they were read, therefore, they will be considered as having been properly before the trial court. She also testified that since 1962 she had not, with one exception,

spent any time at the Francisco property, nor made any payments toward the mortgage, taxes and insurance thereon.

Paul Andres testified that he had no recollection of anything being said at the assignment meeting about the return of the property. He further testified that defendants were to assume the mortgage on the subject property and that he, at no time, asked for the return of the property.

Helen McCaffrey testified that when the assignment took place there was no mention made of the property being returned; that the reason for the assignment was to save the house; that she and her son agreed to continue making mortgage payments; and that plaintiff had not, until "recently," asked for the property's return.

John McCaffrey testified that he and his mother were to take over the mortgage payments because of the plaintiff's troubles.

OPINION

The trial court, in initially granting the summary judgment, found there were no genuine issues of material fact and that, as a matter of law, defendants were entitled to judgment (Ill. Rev. Stat. 1971, ch. 110, par. 57). The hearing held on plaintiff's motion to vacate the judgment produced no new facts giving the court cause to vacate its original ruling. In its decree¹ the court found, inter alia, that the assignment made to defendants was for the purpose of hindering plaintiff's creditors. We note that this determination was reached after considering the plaintiff's pretrial deposition, and her trial testimony in the divorce

1/ The court found that: plaintiff was guilty of laches in initiating her action; the transfer to the defendant was done for the purpose of putting the property out of the reach of creditors; the defendants had made subsequent unrecompensed improvements on the property in addition to paying all mortgage, tax and insurance payments; no proof was established by plaintiff that there was a resulting or constructive trust.

proceeding, wherein plaintiff stated her intention in assigning was to secrete the property from her creditors. Moreover, the fact that the Reharts' deficiency judgment remained unsatisfied militated against plaintiff's position that no creditors were harmed by the assignment. Accordingly, the trial court was constrained to follow well established equity principles which, as a matter of law, preclude a grantor (plaintiff herein) from profiting by his or her misdeeds.

The court in Rosenbaum v. Huebner, 277 Ill. 360, 367, responding to a factual situation comparable to the one herein, declared:

"It is a well settled doctrine that where a conveyance has been made for the purpose of hindering, delaying or defrauding creditors of a grantor, or where anticipated danger of litigation or criminal prosecution has influenced the conveyance, equity will not interpose to restore to the grantor or his heirs the title to the property so conveyed. (McElroy v. Hiner, 133 Ill. 156; Dorman v. Dorman, 187 Ill. 154; Brady v. Huber, 197 Ill. 291; Graham v. Townsend's Estate, 62 Neb. 364; 2 Pomeroy's Eq. Jur. sec. 973.)"

In Ford v. Caspers, 128 F.2d 884, 885 (7th Cir. 1942), plaintiff conveyed land to defendant in an attempt to defraud plaintiff's creditors. Later, plaintiff sought an accounting for profits from the subject property. The court, on appeal from the trial court's denial of plaintiff's action, stated:

"The court concluded, as a matter of law: 'Where two or more persons engage in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons as against the other from the consequences of their own misconduct.'"

Similarly, in Paris v. Morris, 331 Ill.App. 367, 73 N.E.2d 329, decedent by various schemes attempted to keep his property from his creditors and at the same time ultimately vest title in his sons. The court, in findings that plaintiffs, who were decedent's children, had no right to maintain the action, stated at page 370:

"It has been the settled rule in equity in this State that the law will not permit a person to deliberately put his property out of his control for a fraudulent purpose, or permit those in privity with him to do so, and then assist either through the intervention of a court of equity in regaining the same after such fraudulent purpose has been accomplished."

In Cox v. Dewey, 282 Ill.App. 551, 554, appellant gave appellee certain money to be held while a judgment was outstanding against the appellant. The court, denying plaintiff's request for the return of the funds, found:

"It has consistently been held that where a transaction is tainted with fraud, as between the parties to it, a court will not assist either but will leave the parties in the position in which they have placed themselves."

We are of the opinion that the trial court was correct in its finding that there was no genuine issue as to the fact that the assignment here was for the purpose of hindering creditors, and that the court was correct in its application of the principle that one seeking equitable relief must come into court with "clean hands."

II.

Plaintiff also contends the trial court was in error in applying the doctrine of laches, which, although not raised in the motion for summary judgment, was raised as an affirmative defense in defendants' answer. In this regard, we note that plaintiff in her testimony claimed that she had first asked for the return of the property three weeks after the assignment in January, 1962. However, from that time until the filing of the instant suit in December, 1970, no efforts were made by plaintiff to reimburse defendants for the fraudulent conveyance suit settlement, the mortgage, taxes and insurance payments or the cost of repairs. Not only had the mortgage been reduced from \$10,000 to \$900 in the intervening period, but Paul McCaffrey testified that, in addition, approximately \$7,000 was expended for repairs.

As stated in Gill v. Gill, 8 Ill. App. 3d 625, 627, 628, 290 N.E.2d 897:

"Laches is such neglect or omission to assert a right, taken in conjunction with a lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar to a suit. (People ex rel. Cronin v. Cahill, 118 Ill.App.2d 18, 254 N.E.2d 161.) To charge a party with laches in the assertion of an alleged right it is essential that he should have had reasonable knowledge of all the facts necessary to the assertion of his claim. (Tarpoff v. Karandjeff, 17 Ill.2d 462, 162 N.E.2d 1.) Prejudice or injury to the adverse party is also a requisite element of laches (Pyle v. Ferrell, 12 Ill.2d 547, 147 N.E.2d 341; Carlson v. Carlson, 409 Ill. 167, 98 N.E.2d 779), * * *.

Whether a party has been guilty of laches is a question addressed solely to the sound discretion of the trial court. (Johnson v. Central Standard Life Insurance Co., 102 Ill.App.2d 15, 243 N.E.2d 376.) The decision of the trial court will not be disturbed upon review unless the determination of the court is so clearly wrong as to constitute an abuse of discretion. Johnson v. Central Standard Life Insurance Co., 102 Ill. App.2d 15, 243 N.E.2d 376; Trustees of Schools of Tp. No. 38 No. v. City of Chicago, 308 Ill.App. 391, 32 N.E.2d 180."

From our examination of the record we feel there was no abuse of discretion by the trial court in its finding that the doctrine of laches precluded plaintiff from asserting any right she might have had.

For the reasons stated, we conclude that the trial court properly found that defendants were entitled to summary judgment, and properly denied the motion to vacate the judgment. We, therefore, affirm.

Judgment affirmed.

58616

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

CHARLES HAYES,

Defendant-Appellant.



HON. FRANK J. WILSON,
Presiding.

Mr. JUSTICE GOLDBERG delivered the memorandum opinion of the court:

After a bench trial, Charles Hayes (defendant) was found guilty of rape (Ill. Rev. Stat. 1971, ch. 38, par. 11-1(a).) He was sentenced to ten to 20 years in the penitentiary. His appeal is best disposed of by a memorandum opinion, Supreme Court Rule 23, Ill. Rev. Stat. 1971, ch. 110-A, R. 23.

The evidence showed that the complaining witness had seen defendant five or six times at her place of employment. As she went to work early one morning, defendant seized her arm and slapped her. He was carrying a stick some two and one half to three feet long. She screamed and pleaded with him. He pulled her into a small dark room and had intercourse with her. He then told her not to move and ran away. Her testimony is corroborated by her immediate complaint, (People v. Bush, 11 Ill. App. 3d 31, 36, 295 N. E. 2d 548) and by a stipulated medical opinion regarding presence of sperm.

Defendant testified that he was not present at the designated place and date and made a general denial. In our opinion, the "evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt." Supreme Court Rule 73; see also People v. Reese, 54 Ill. 2d 51, 57, 58, 294 N. E. 2d 288.

Defendant's only viable argument is that the evidence does not prove beyond reasonable doubt that the act was forcibly

performed. We are convinced that this contention is unfounded and that no error of law appears. (People v. Sims, 5 Ill. App. 3d 727, 730, 283 N. E. 2d 906; People v. Chambers, 127 Ill. App. 2d 215, 222, 262 N. E. 2d 170; People v. Scott, 82 Ill. App. 2d 109, 116, 227 N. E. 2d 72.) The sentence imposed for this class 1 felony is proper under the Illinois Unified Code of Corrections, Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(2).

An extended opinion here would have no precedential value.

Judgment Affirmed.

BURKE, J., and HALLETT, J., concur.

(Abstract only).

CHICAGO BAR
APR 17 1974
ASSOCIATION
-Appellant,

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HONORABLE
DANIEL A. ROBERTS,
PRESIDING.

HONORABLE
DANIEL A. ROBERTS,
PRESIDING.

HONORABLE
DANIEL A. ROBERTS,
PRESIDING.

Plaintiff William Iaculla sued defendant Village of Stickney for injuries received from a fall when he slipped on a patch of ice which had formed due to an alleged defect in the curbing and sidewalk in front of plaintiff's home. The trial judge directed a verdict for defendant on the ground that plaintiff was guilty of contributory negligence as a matter of law. The sole issue is whether the direction of the verdict for defendant was proper.

Plaintiff testified that an access walk extended from the line of his sidewalk towards the curb across the parkway; at the curb, cement ran parallel to the curb; the access walk was sunken, a condition that had existed at least two years prior to the accident; after a snowstorm, if there was a thaw, water seeped through the two cracks in the curbing. He further testified that he had made many complaints to the Village of Stickney about that condition, including a complaint a year or so before the accident, when the curbing across the street was being fixed. This complaint was to a village trustee, whom he identified by name. The village did not take any action after he made the complaint. On Sunday, January 19, 1969, the day of his injury, the sun was shining; it was clear and the temperature was below freezing. He had on his winter coat, a winter cap and his work shoes--the shoes he wore

as a mailman. He left the house, went down the walk towards his car at the curb, reached out to put his right hand to open up the door of the car and the next thing he knew he was flying through the air and landed on his left side and broke his wrist. There was a very thin layer of ice formed that caused him to fall. Plaintiff then testified as to his injury, his medical care and his time away from his job.

The trial court indicated that plaintiff was guilty of contributory negligence because of his prior knowledge of the condition and that it desired to save time and shorten the trial. Thereupon plaintiff made an offer of proof as to the broken condition of the curbing, the fact that ice accumulated in that area and as to the weather conditions on and prior to the date of his fall. The court thereafter refused the offer of proof and directed the jury to find for the defendant on the ground that plaintiff knew of the condition and was therefore contributorily negligent.

Plaintiff contends that the trial court incorrectly directed a verdict because, under the facts here, the issue of plaintiff's contributory negligence was for the jury. We agree.

The use of a defective sidewalk by a person who has knowledge of the defect is not contributory negligence per se, and if, while walking upon that sidewalk, such person is in the exercise of ordinary care for his or her safety, there may be a recovery in case of an injury. (Swenson v. City of Rockford, 9 Ill. 2d 122, 136 N.E. 2d 777; Foster v. Cyrus & Co., 2 Ill. App. 3d 274, 276 N.E. 2d 38; Jones v. City of Rock Island, 101 Ill. App. 2d 174, 242 N.E. 2d 302.) The issue of contributory negligence is ordinarily a question for the trier of fact—the jury in the instant case. It becomes a question of law only if all of the evidence, when viewed in its aspect most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary finding based on that evidence

could ever stand. Crown v. Village of Elmwood Park, 118 Ill. App. 2d 278, 255 N.E. 2d 47; Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 229 N.E. 2d 504.

Here, the fact that plaintiff knew of the claimed defective condition and that ice could form after a snow and thaw followed by a freeze does not so overwhelmingly favor defendant that no jury verdict for plaintiff could ever stand. This fact was only one of the circumstances to be considered by the jury. Further, if the trial court had not ended the trial so precipitously, plaintiff would have had the opportunity to explain why he walked where he did and to offer other evidence material to the issues. It cannot be said, even under the evidence in the record, that all reasonable minds would agree that plaintiff was guilty of negligence which proximately contributed to his injury. The jury should have had the opportunity in the case at bar to have determined that issue.

The evidence shows that the ice on which plaintiff slipped resulted from the defect in the curb and the cement walk. Under these circumstances, the defendant village can be held liable because, if a slippery condition is combined with a structural defect in the sidewalk, liability may be imposed if the defect is found to be the proximate cause of the injury. Davis v. City of Chicago, 8 Ill. App. 3d 94, 97, 289 N.E. 2d 250.

Ritgers v. City of Gillespie, 350 Ill. App. 485, 113 N.E. 2d 215, cited by defendant, is inapposite on its facts. There is no evidence that the icy conditions here were as obviously dangerous as those there.

Finally, citing Roth v. Avenue State Bank (1973), 11 Ill. App. 3d 456, 297 N.E. 2d 253, defendant urges us to affirm the trial court's order on the ground that plaintiff never proved that

the defendant had control over and a duty to maintain the defective cement walk and curbing. We reject this argument for two reasons.

First, the trial court entered its order before plaintiff had finished proving up his case and, therefore, we cannot know whether plaintiff would or would not have proved that defendant had control over the cement walk and curbing. Second, even if the plaintiff had failed to offer such proof, there is a presumption that the defendant did exercise such control. (City of Anna v. Boren (1898), 77 Ill. App. 408.) There, the court rejected a similar contention by the defendant city, holding that streets of a municipality are presumed to be public streets, and it is further presumed that the municipality built, maintained, and is in possession of sidewalks along such streets. Further, "evidence showing that a walk has been repaired by the city is sufficient to warrant the jury in finding that it was in possession of the city."

Here there was evidence that the curbing across the street from the location of plaintiff's injury had been repaired by the village approximately one year before plaintiff's accident.

We conclude Roth does not control here. In that case we held that where a pedestrian, suing a bank for injuries sustained while crossing a snow-covered driveway leading to bank's drive-up facilities, introduced no evidence to substantiate his allegation that the bank, not the city, controlled and had a duty to maintain the walkway in a safe condition, the bank could not be held liable for his injuries as a matter of law. That case concerned a suit against a private institution, whereas, the present case concerns a suit against the village. Since the presumption is one of public control over public ways, clearly Roth does not apply.

The judgment of the circuit court of Cook County is reversed and the cause remanded for a new trial.

Judgment reversed and cause
remanded for a new trial.

BURKE and GOLDBERG, JJ., concur.



17 I.A. 305

58338

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
ALLEN J. MEYEROWITZ,	)	HONORABLE
	)	WAYNE W. OLSON,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:*

Allen J. Meyerowitz (defendant) entered a plea of guilty on October 30, 1970, to the offense of unlawful possession of marijuana, in violation of section 22-3 of the Criminal Code, and was placed on probation for a period of three years and assessed a fine of \$500. (Ill. Rev. Stat. 1969, ch. 38, par. 22-3.) Defendant filed no appeal from that judgment of conviction, and it appears that he commenced payment of the fine assessed at the rate of \$15 per month.

On April 14, 1972, defendant filed a motion in the case to set aside the judgment of conviction, terminate probation, and return to him that portion of the assessed fine theretofore paid (\$260 plus interest), on the ground that the classification of marijuana as a narcotic drug in the Narcotic Drug Act, under which he had pleaded guilty, had been found unconstitutional by the Illinois Supreme Court in People v. McCabe, 49 Ill. 2d 338, 275 N.E. 2d 407, and People v. Hudson, 50 Ill. 2d 1, 276 N.E. 2d 345. The trial court set aside the judgment of conviction and terminated defendant's probation and the payments on the balance of \$240 still due on the fine, but the court denied the prayer that defendant be reimbursed, plus interest, for all payments theretofore made by him on the fine. The instant appeal is taken from the latter part of the trial court's order, denying reimbursement of the \$260 portion

of the fine theretofore paid by defendant.

Defendant did not allege in his motion for reimbursement, nor does he contend on this appeal, that the payments on the fine which had been made prior to the setting aside of the conviction were made either under duress or protest, through fraud or deception, or were otherwise made involuntarily. Further, defendant did not appeal from the judgment of conviction in which the fine was imposed, and he commenced payment of that fine in installments after that judgment was entered. The payments having been voluntarily made by defendant, he cannot now be heard to demand reimbursement thereof. See People v. Bandy, 239 Ill. App. 273; Berg v. City of Chicago, 97 Ill. App. 2d 410, 240 N.E. 2d 344 (Lv. to App. Den., 39 Ill.2d 627).

The case of People v. Shambley, 4 Ill. 2d 38, 122 N.E. 2d 172, cited by defendant, involved the question of whether a defendant could contest the validity of his conviction on appeal after having paid the fine assessed upon that conviction, and did not involve the question of whether the fine would be refunded upon an invalidation of the conviction. The case of United States v. Lewis (E.D.La., 1972), 342 F. Supp. 833, also cited by defendant, is distinguishable from the case at bar in the nature of the activity sought to have been proscribed by statute, and, being the determination of a lower federal court, is not binding upon the Illinois courts. People v. Stansberry, 47 Ill. 2d 541, 268 N.E. 2d 431 (cert. den. 404 U.S. 873).

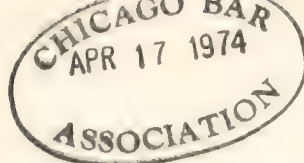
For these reasons, the order of the circuit court of Cook County is affirmed.

ORDER AFFIRMED.

* SECOND DIVISION, FIRST DISTRICT.
LEIGHTON, J., did not participate.

1-22-14
2nd floor
20/21

58223)
58224)



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PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE
)	CIRCUIT COURT OF
v.	)	COOK COUNTY
)	
CHARLES BOWERS,)	
	)	HON. JOHN J. McDONNELL,
Defendant-Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Charles Bowers, was charged with failure to possess a Firearm Owner's Identification Card (Ill.Rev.Stat. 1971, ch.38, par.83-2), and for failure to register a firearm under the City of Chicago ordinance (Chicago Municipal Code 1973, ch.11.1, sec.7). A hearing was held on defendant's motion to suppress the gun as evidence and denied. Defendant was found guilty on both charges after a bench trial and sentenced to serve ten days in the House of Correction on the state charge and fined One Hundred Dollars on the city charge.

Defendant argues on appeal that (1) his conviction for violating the city gun registration ordinance cannot be sustained because there was no proof that he did not register the firearm, and (2) he should have been granted probation rather than incarceration on the state charge of failure to possess a Firearm Owner's Identification Card.

The defendant, an owner of a grocery store on South Pulaski Road in Chicago, was arrested in his store on a warrant. At the time of his arrest, he was seen putting a gun with its holster under the counter by the arresting officer. When asked if the gun "was registered" he said "it was," but he failed to produce either a city firearm registration card for the weapon or a State Firearm Owner's Identification Card at that time. A

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later attempt by him to locate a registration card among his papers at home was unsuccessful. He also failed to produce any registration card in court at the time of the trial.

The defendant's testimony at trial regarding registration of the gun was confusing. He testified that he worked for the Sheriff's Office from 1967 to 1970 at 26th Street and California Avenue in Chicago, and that when the gun registration law was passed he "made application to Commander Walsh, Lieutenant Walsh, and Sergeant Conway *** at 26th and California." He also testified that he went to 1121 South State Street (Chicago Police Headquarters) to register the gun. He said he was given receipts, but could not locate them. When asked "were you sent these registration cards ever?" he replied that "Commander Walsh never sent one of the cards and I had one and they got stolen at 72nd and Indiana Boulevard." He was later asked:

"Q. Did you explain to the investigator [at the time of arrest] that your registration cards were not received by you?

A. Yes.

Q. At that time?

A. No, I didn't because I had one of them and I was looking for it. I went to my home to look for it."

The defendant argues on appeal that there was no proof at trial that the gun was not registered in compliance with the city ordinance, and that the city has failed to sustain its burden. We do not agree.

We note first that defendant's testimony that he complied with the registration ordinance was, as illustrated above, evasive and conflicting. He produced no other evidence of registration. Furthermore, after first asserting on cross-examination

that he went to the City Collector's office to attempt to register the weapon, and also that he went there to attempt to obtain a duplicate copy of that registration, he was asked:

"Q. Do you have a copy of your request for a duplicate copy of that registration?

A. They said they could not find the one that was registered in 1967.

Q. So they have no record of this ever being registered, is that correct?

A. Yes." [Italics added.]

We feel that defendant's own admission under cross-examination in open court that no record of registration exists is sufficient proof of that fact. It is well-established law that "[a]dmissions made in the course of judicial proceedings are substitutes for, and dispense with, the actual proof of facts in such proceeding." (22A C.J.S. Criminal Law, sec.733, p.1061; see State v. Kimbrough, 350 Mo.609, 166 S.W.2d 1077.) Since an accused can expressly admit away his whole case by pleading guilty, he can admit away any part of it. (People v. Hobbs, 400 Ill.143, 151, 79 N.E.2d 202, 206; People v. Dixon, 81 Ill.App. 2d 330, 338, 225 N.E.2d 445, 449.) Coupled with defendant's suspect testimony, uncorroborated by any physical evidence of registration, defendant's admission was sufficient to sustain a finding of guilty and the imposition of a One Hundred Dollar fine on the city charge of failure to register the firearm.

Defendant does not question the propriety of his conviction on the State charge of failure to possess a personal identification card. He submits, however, that his sentence of ten days incarceration for that offense should be reduced to probation.

As we noted recently in People v. Sivals, ____ Ill.App.3d ____, ____, 302 N.E.2d 659, 662, the Supreme Court

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"has consistently held that probation has been a purely discretionary matter vested in the trial court, and the scope of review from a denial of an application for probation has been traditionally limited." (People ex rel. Ward v. Moran, ___ Ill.2d ___, ___, 301 N.E.2d 300, 301.)

The "determination [of the trial court] is subject to review to the extent of ascertaining whether the trial court did, in fact, exercise discretion or whether it acted in an arbitrary manner." (People v. Saiken, 49 Ill.2d 504, 514-15, 275 N.E.2d 381, 388.)

The defendant was a former deputy sheriff. The record indicates that he was well aware of the necessity of obtaining an identification card. The sentence imposed was well within the limits prescribed by statute. [Ill.Rev.Stat., 1972 Supp., ch. 38, par.83-14; Ill.Rev.Stat., 1972 Supp., ch.38, par.1005-8-3 (a)(1).] We do not feel the trial court acted arbitrarily in not granting probation. The judgment will be affirmed.

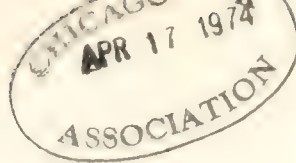
Judgment affirmed.

ADESKO, P. J., and

DIERINGER, J., concur.

(Abstract only)

[illegible]

171A.375^{3D}

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. DONALD WRIGHT,

Relator,

v.

JOHN J. TWOMEY, WARDEN
ILLINOIS STATE PENITENTIARY,
JOLIET, ILLINOIS,

Respondent.

)
)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
)

) HON. RICHARD J. FITZGERALD,
) JUDGE PRESIDING.
)
)

Mr. JUSTICE BURMAN delivered the opinion of the court.

Donald Wright, the relator, was found guilty of unlawful restraint and sentenced to one to two years in the penitentiary. On October 4, 1972, he filed a pro se petition for writ of habeas corpus directed to John J. Twomey, Warden of the Illinois State Penitentiary, in which he alleged that his incarceration was illegal because the court imposed sentence without being aware of his work record and without hearing witnesses who would have testified to his rehabilitation. He contended that had the court considered this evidence it would have placed him on probation or given him a lighter sentence.

The court on its own motion appointed the Public Defender as counsel for relator. A hearing on the petition was had on October 25, 1972, at which time the court, after being advised of the contents of the petition, granted the State's motion to dismiss. The relator prosecutes this appeal from the order of dismissal.

On July 24, 1973, the Public Defender filed a motion in this court requesting leave to withdraw on the ground that the present appeal is without merit and could not possibly be successful. Pursuant to the holding in Anders v. California (1967), 386 U.S. 738, he filed a brief in support of his motion in which he stated that, in his opinion, the matters alleged in the relator's petition are not of the type properly raised in a petition for writ of habeas corpus.

After reviewing the record, we are inclined to agree with the Public Defender. The Habeas Corpus Act specifically states the causes for which one in custody by virtue of process from a court legally constituted may be discharged. (See Ill. Rev.Stat.1969, ch.65, par.22.) These are that the court lacked jurisdiction of the subject matter or person of the defendant, that some subsequent event has occurred which entitles the party to discharge, that the process is defective in substance or issued by an unauthorized person, that the relator is in the custody of an unauthorized person, that the process has been obtained through bribery or false pretenses and that the process is not based upon any existing rule of law. The court is limited to these matters in its inquiry and may not otherwise question the legality or justice of the conviction. This is true even though the relator claims the denial of a constitutional right. (People ex rel. Haven v. Macieiski (1967), 38 Ill.2d 396, 231 N.E.2d 433.)

It is obvious that the matters raised by the relator do not fall within any of the above categories. His petition appears to be an attempt to attack the propriety of his sentence, a subject properly raised, if at all, in an appeal.

The Public Defender served a copy of his motion upon the relator prior to filing it. In addition, we notified the defendant of the motion in a letter dated October 19, 1973. In the same letter we gave the defendant until December 1, 1973, to file any additional information in support of his appeal. We informed him that after such date we would make a full examination of all of the proceedings and that if we found that the appeal was without merit we would grant the Public Defender's motion and would affirm the trial court's order without further appointment of counsel.

For the reasons stated above we have concluded that the present appeal is wholly frivolous. The motion of the Public Defender for leave to withdraw is granted, and the order of the trial court dismissing the relator's petition is affirmed.

AFFIRMED; MOTION FOR LEAVE TO WITHDRAW GRANTED.

ADESKO, P. J., and

DIERINGER, J., CONCUR.

(Abstract only)



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY
)	
MICHAEL GUYON,	)	HON. ROBERT L. MASSEY,
Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Michael Guyon, pleaded guilty to aggravated battery and attempted murder. The court, after admonishing him of the consequences of his plea and hearing stipulated facts, sentenced him to a term of five to ten years in the penitentiary on the attempted murder charge. He brings the present appeal from this judgment.

The defendant filed his notice of appeal on March 20, 1973. Shortly thereafter the Public Defender of Cook County was appointed to represent him. On September 17, 1973, the Public Defender filed a motion in this court for leave to withdraw on the ground that the present appeal is without merit and could not possibly be successful. Pursuant to the holding in Anders v. California (1967), 386 U.S.738, he filed a brief in support of his motion in which he stated that, in his opinion, the only possible basis for an appeal would be that the court did not advise the defendant fully of the consequences of his plea. He further stated that he had reviewed the record and had concluded that the trial court had complied with the law in admonishing the defendant and accepting the plea.

After conducting our own review of the record, we are inclined to agree with the Public Defender. The requirements for acceptance of a plea of guilty are set forth in section 115-2 of the Criminal Code. (Ill.Rev.Stat. 1969, ch.38, par.115-2.) They are that the court inform the defendant of the consequences of his plea and the maximum sentence which may be imposed upon its acceptance. The requirements of this section are amplified

by Supreme Court Rule 402 (Ill.Rev.Stat.1970, ch.110A, par. 402) which provides that before accepting a plea of guilty the trial judge shall address the defendant in open court and determine that he understands the nature of the charge, the minimum and maximum sentences prescribed by law, that he has a right to plead not guilty or to persist in such a plea and that if he does plead guilty there will be no trial of any kind. The judge is also under a duty to determine that the plea is voluntary and to confirm the terms of the plea agreement, if any.

The transcript of proceedings in the present case indicates that the court did each of these things scrupulously prior to accepting the defendant's plea. The court was, in fact, so conscientious that at one point it was prepared to not accept the plea and proceed with a trial. Only after a thorough and careful inquiry of the defendant, during which he stated his guilt emphatically, did the court agree to accept the plea. Further, the record indicates that the evidence stipulated to is sufficient to sustain the charges in the indictment and that the defendant received the sentence agreed upon.

The Public Defender served a copy of his motion upon the defendant prior to filing it. In addition, we notified the defendant of the motion in a letter dated October 18, 1973. In the same letter we gave the defendant until December 15, 1973, to file any additional information in support of his appeal. We informed him that after such date we would make a full examination of all of the proceedings and that if we found that the appeal was without merit we would grant the Public Defender's motion and would affirm the trial court's order without further appointment of counsel.

For the reasons stated above we have concluded that the present appeal is baseless. The motion of the Public Defender for leave to withdraw as counsel for defendant is granted, and the judgment of the trial court is affirmed.

Judgment Affirmed.

ADESKO, P. J., and
DIERINGER, J., concur.

(Abstract only)



58193

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
EDWIN ZAYAS,	)	HONORABLE
	)	IRWIN COHEN,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Defendant was charged by complaint with battery and theft in violation of Sections 12-3 and 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, pars. 12-3, 16-1(a)(1)).** After a bench trial, defendant was found guilty of both offenses and sentenced to probation for a period of one year with the condition that the first 30 days be served in the House of Correction, on each charge, the sentences to run concurrently. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial the following evidence was adduced: Jessie Stafford testified, as a witness for the State, that on July 7, 1972, at approximately 9:40 in the evening, she was walking down the street at 1845 South Wood Street, Chicago, Illinois. She was grabbed by the defendant and a second man. While the second man held her arm, defendant grabbed her purse and jerked it loose, throwing her

* Justice English did not participate.

** "§ 12-3. Battery.] (a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."

* * *

"§ 16-1. Theft.] A person commits theft when he knowingly:
(a) Obtains or exerts unauthorized control over property of the owner; or
(1) Intends to deprive the owner permanently of the use or benefit of the property; or
* * *"

to the ground. Both men ran, and Miss Stafford chased the men to the corner and then went to a hot dog stand and immediately called the police. She received several cuts on her arm as a result of the attack, and \$30 was taken from her purse. She has lived in the neighborhood for 10 years and had previously seen the defendant in the neighborhood many times but had never spoken to him before. The next evening she saw the defendant at a dance and immediately called the police who placed the defendant under arrest.

On cross-examination it was brought out that it was dark outside. Miss Stafford gave as a description to the police that her assailants were two boys, both about the same size, and one boy was wearing a hat and a dark jacket.

Officer Topel testified, as a witness for the State, that on July 8, 1972, he responded to a call and met Miss Stafford, who identified the defendant at a dance as the man who had robbed her the previous evening. He then placed defendant under arrest.

Defendant testified that he did not rob or strike Miss Stafford on July 7, 1972. On the evening of July 7, 1972, he was at home with his mother, his father, his seven brothers and six sisters.

Opinion

Defendant's only argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the identification testimony was insufficient. In a bench trial the credibility of witnesses is for the trial judge to determine. (People v. Wright, 3 Ill. App. 3d 262, 278 N.E.2d 175.) The decision of the trier of fact as to credibility of witnesses will not be disturbed unless it is based on evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. (People v. Catlett,

48 Ill. 2d 56, 268 N.E.2d 378; People v. Daugherty, 1 Ill. App. 3d 290, 274 N.E.2d 109.) The testimony of one witness, if positive and credible, is sufficient to sustain a conviction even though contradicted by the accused. People v. Bonds, 132 Ill. App. 2d 827, 270 N.E.2d 575; People v. Stewart, 62 Ill. App. 2d 428, 211 N.E.2d 154.

In the case at bar the testimony of Miss Stafford was clear and convincing. She testified that the defendant and another man grabbed her and pulled her purse, throwing her to the ground. She was in close proximity to defendant for a period of time. She had previously seen defendant in the neighborhood on several occasions. She positively identified the defendant from a large group of people attending a dance the day after the incident. Miss Stafford's lack of an exact facial description of her attackers to the police does not create a reasonable doubt since precise accuracy in describing a defendant's facial characteristics is unnecessary where the identification is positive. (People v. Miller, 30 Ill. 2d 110, 195 N.E.2d 694.) Her identification of defendant on the following evening was immediate and stood unshaken during intensive cross-examination at trial. After a complete review of the record, it cannot be said that the trial judge's determination was erroneous. People v. Wright, 10 Ill. App. 3d 1035, 295 N.E.2d 510; People v. Gaiter, 8 Ill. App. 3d 784, 291 N.E.2d 172.

Although not argued by either side in their briefs, we have noted that defendant's concurrent sentences for theft and battery are improper. In People v. Redding, 12 Ill. App. 3d 150, 298 N.E.2d 238, the defendant was convicted and sentenced to concurrent terms for both theft and battery. The evidence adduced at trial demonstrated that the complainant was accosted on the street and her purse containing several dollars was taken.

During the attack she was knocked to the ground. In considering the propriety of concurrent sentences for both theft and battery, this court said:

"Defendant next contends that it was error for the court to have sentenced him for both the offenses of theft and battery. We agree. There is no evidence in the record to indicate that the conduct of the defendant and Hayes in knocking the victim to the ground was other than to effectuate the theft of the coin purse, which constituted but a single transaction on their part and which will support but a single sentence, for theft. The sentence imposed upon the conviction for battery must therefore be vacated. (People v. Smith, 8 Ill. App. 3d 270, 290 N.E.2d 261, 263.)"

Similarly in the case at bar, defendant's conduct in knocking the victim to the ground was the force used in order to gain possession of her purse. The conduct which constituted both offenses was part of a single transaction and therefore only one sentence may be imposed. The sentence imposed upon the defendant for battery must therefore be vacated.

Although not argued by either side in their briefs, we have also noted that defendant's sentence violates the Unified Code of Corrections as originally enacted. Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Harvey, 53 Ill. 2d 585, 294 N.E.2d 269.) Defendant was placed on one year's probation with the condition that he spend the first 30 days in the House of Correction. The Unified Code of Corrections as originally enacted provides that when a defendant is placed on probation, he can be committed to a period of imprisonment only under Article 7 (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-6-3(d)). Article 7 of the Unified Code of Corrections (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-7-1) provides only for periodic imprisonment. Here the condition that defendant spend the first 30 days in the House of Correction is improper and must be vacated. People v. Claudio, 13 Ill. App. 3d 537, 300 N.E.2d 791.

We have noted that the Unified Code of Corrections has been amended by Public Act 78-939 (which is new law) to provide that a defendant may be imprisoned as a condition of probation for up to six months. However, since this act does not provide an effective date, it would not be effective until July 1, 1974 (1970 Illinois Constitution, Article IV, Section 10). People ex rel. Klinger v. Howlett, 50 Ill. 2d 242, 278 N.E.2d 84.

The judgment of conviction for battery is affirmed and the sentence entered thereon is vacated; also, the sentence on the judgment of conviction for theft is modified by eliminating the condition that defendant spend the first 30 days in the House of Correction and, as modified, is affirmed.

JUDGMENTS AFFIRMED, SENTENCES
MODIFIED IN PART AND VACATED
IN PART.

Abstract Only.

59085

JOHN A. MARTINEC,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff and Counter-)	
defendant-Appellee,)	
)	
v.)	
)	
CAROLYN H. MARTINEC,)	
	)	HONORABLE
Defendant and Counter-	)	DAVID LINN,
plaintiff-Appellant.	)	PRESIDING.



PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Defendant, Carolyn H. Martinec, appeals from an order reducing the amount of child support paid by the plaintiff, John A. Martinec, from \$140 a month to \$60 a month. The order also provided that the reduction of \$80 a month would remain in abeyance and accrue to the benefit of the minor child; and that the plaintiff would not be required to pay the same until he completed or terminated his college education and was available for full-time employment.

Defendant contends that a voluntary change in occupation or employment which results in a substantial reduction in income is not a proper ground for a reduction in child support payments.

On January 29, 1970, a decree for divorce was granted the defendant who was awarded custody of the minor child and granted the sum of \$140 a month for child support. On October 10, 1972, the defendant filed a petition for an increase in child support based upon an alleged increase in plaintiff's salary and an increase in the needs of the minor child. On December 13, 1972, the plaintiff filed a counter-petition for a decrease in child support payments alleging a decrease in his income because of a change in employment from a full-time policeman for the City of Chicago to a full-time college student.

* Judge English did not participate.

After a hearing on the petition and counter-petition, the trial court found that the defendant is a part-time employee, earning a net income of between \$60 and \$70 a week; that the plaintiff terminated his employment with the Chicago Police Department in November 1972, is presently a full-time college student and due to receive a monthly benefit of \$210 under the United States G.I. Bill of Rights in addition to his college enrollment costs; that a change of circumstances existed with respect to the plaintiff's employment and financial situation; that the plaintiff had a right to terminate his employment as a Chicago police officer because such employment involved a danger to his safety, which is a permissible reason for termination; and that none of the provisions of the order reducing the amount of child support will cause any actual loss of any benefits to the minor child.

The court entered an order, the relevant parts of which are as follows:

"II. That effective February 1, 1973, the Counter-Defendant's obligation to pay child support to the Counter-Plaintiff shall be modified as follows:

"a. That the Counter-Defendant shall pay unto the Counter-Plaintiff the sum of \$60.00 per month as his contribution toward the support of the child of the parties.

"b. That this sum of \$60.00 per month includes a reimbursement by the Counter-Defendant to the Counter-Plaintiff for the additional costs to her of maintaining the minor child on her presently existing health insurance policy.

"c. That so long as this modification remains in existence, the sum of \$80.00 per month will accrue to the benefit of the minor child from the Counter-Defendant, but the Counter-Defendant will not be required to pay until he has completed or terminated his college education and becomes again available for full-time employment, and at such time, upon service of notice to the opposite party, the Court can establish the use of this obligation which has accrued to that point, and the method in which the Counter-Defendant will begin to make payments to fund this obligation created by this ORDER.

"III. That during the existence of this modification, due to the Counter-Defendant's becoming a full-time student, the Counter-Defendant will annually supply the Counter-Plaintiff with copies of his federal income tax returns, commencing with the return due for the year 1973, and in the event he has part-time employment which brings him income in excess of \$90.00 per month, then he shall notify the Counter-Plaintiff of this employment and the Counter-Plaintiff may seek modification of the allowance set herein.

"IV. That when the Counter-Defendant has completed or terminated his activities as a full-time student, upon proper notice and application, the Court will determine the support obligations of the Counter-Defendant, predicated on his then financial abilities and the needs of the minor child."

Opinion

Section 18 of the Divorce Act (Ill. Rev. Stat. 1971, ch. 40, par. 19) provides in part as follows:

"The court may, on application, from time to time, terminate or make such alterations in the allowance of alimony and maintenance, and the care, education, custody and support of the children, as shall appear reasonable and proper."

The modification of provisions for the payment of alimony and child support rests in the sound discretion of the court, and a reviewing court will not interfere with the exercise of such discretion in the absence of its abuse. Scalfaro v. Scalfaro, 123 Ill. App. 2d 23, 259 N.E.2d 644; Edwards v. Edwards, 125 Ill. App. 2d 91, 259 N.E.2d 820; Lewis v. Lewis, 120 Ill. App. 2d 263, 256 N.E.2d 660.

A voluntary change in occupation or employment made in good faith may constitute a material change in circumstances sufficient to warrant a modification of child support payments. (Nelson v. Nelson, 225 Ore.257, 357 P.2d 536.) A divorce decree does not freeze a father in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his child. The court should take into consideration not only the circumstances of the child but that of the father as well. Ordinarily a man makes a change

in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the child rises or falls with the changes in the father's fortunes. Surely this readjustment should be no different because divorce has separated them physically, unless the move was made to avoid responsibility or is made in bad faith. Fogel v. Fogel, 184 Neb. 425, 168 N.W.2d 275, 277.

In the case at bar, even though the plaintiff resigned his position in November 1972 after the defendant had filed her petition for an increase in child support, the trial court found that the plaintiff had a right to terminate his employment as a Chicago police officer because such employment involved a danger to his safety; that if the plaintiff is successful in his endeavors to become a lawyer, he will earn a substantial amount of money over and above the award of \$140 a month; and that the reduction in the payment of child support will not cause an actual loss of any benefits to the minor child.

It should be noted that the order reducing the amount of monthly child support payments from \$140 a month to \$60 a month provided that the \$80 a month reduction would remain in abeyance and accrue to the benefit of the minor child which sum the plaintiff would be required to pay when he completed or terminated his college education and again became available for full-time employment, the method of payment to be determined by the court. A similar situation existed in the case of Roberts v. Roberts, 1 Ore. A. 106, 459 P.2d 562, where the court reduced the \$400 a month child support provision to \$200 a month. The defendant had sold his dental practice which earned him about \$18,000 a year and returned to school so that his present income was insufficient to do more than support himself. The court provided that the reduction in the payment of child support would be only a temporary

reduction while the defendant was in school and would be subject to review at a subsequent date.

In the case at bar the trial court found that the plaintiff acted in good faith in leaving his position as a Chicago police officer and becoming a full-time student; and that the reduction in child support from \$140 a month to \$60 a month would not "cause an actual loss of any benefits to the minor child involved." These determinations, together with the finding that the financial condition of the plaintiff had sufficiently changed since the entry of the divorce decree to warrant its modification, were not an abuse of discretion by the trial court. Scalfaro v. Scalfaro, 123 Ill. App. 2d 23, 259 N.E.2d 644.

The cases cited by the defendant are not applicable to the facts in the case at bar.

The judgment is affirmed.

AFFIRMED.

Abstract Only.

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57134

171A.403
3D
CHICAGO BAR
APR 17 1974
ASSOCIATION

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
KENNETH CERNICK,)
Defendant-Appellant.)

APPEAL FROM)
CIRCUIT COURT,)
COOK COUNTY.)
HON. JOHN J. MC DONNELL,
Presiding.

*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

The defendant, Kenneth Cernick, was found guilty after a bench trial of the offense of reckless conduct in violation of Section 12-5 of the Illinois Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 12-5) and sentenced to one year probation with the first two months to be served in the House of Correction. He was also found guilty of the offense of simple assault in violation of Section 12-1(a) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 12-1) and fined \$10, which was later vacated. On appeal the defendant contends that the State failed to prove him guilty of reckless conduct beyond a reasonable doubt and that the trial court improperly entered concurrent sentences for reckless conduct and simple assault.

The facts disclose that on October 18, 1971, the defendant telephoned Mrs. Ann Kirchoff, the mother of the defendant's girlfriend, and told her that if she did not send her daughter back to his apartment within fifteen minutes he would kill both of them. Mrs. Kirchoff telephoned Police Officer Frank Cacucci, a family friend, and told him of the defendant's telephone call. Later, at about 8:00 or 9:00 P.M., Cacucci, accompanied by two other police officers, went to the defendant's apartment at 1616 West 66th Street, Chicago. They did not have a search warrant but were admitted into the apartment by the defendant's brother, William. After the police officers entered the apartment,

they saw the defendant standing in the front room, with a knife in his left hand and a gun in his right hand. Cacucci backed the defendant up through the front room, into the dining room and then into a small hallway. When the defendant was in the hallway, he backed into the wall and then started toward Cacucci with his left hand extended and the knife out. At that time the defendant was about six feet away. Cacucci pulled his revolver and cocked it because he was afraid the defendant was going to stab him. The defendant dropped the gun and, about thirty seconds later, dropped the knife. The defendant was then taken into custody. The defendant and Cacucci knew each other before this incident.

Police Officer Raymond M. Bednarowski, who together with Police Officer Shields accompanied Cacucci to the apartment, substantially corroborated the testimony of Police Officer Cacucci. On cross-examination, he said that when the defendant had the knife in his hand he was about fifteen feet from Cacucci.

The defendant testified that at the time the police officers entered the apartment he was in the kitchen, cutting bread; that when he heard noises emanating from the living room, he proceeded toward that room armed with a knife in his left hand and a gun in his right hand; and that the gun was not loaded. On cross-examination, the defendant testified that prior to October 18, 1971, he had an argument with Mrs. Kirchoff over the telephone and that "I imagine that I threatened to kill her."

The trial court found that the police officers announced they were police officers to the defendant's brother prior to their entry into the apartment; that the defendant could hear this announcement; that the police officers had come to talk to the defendant; that the defendant and Police Officer Cacucci knew

each other prior to the incident; that Cacucci saw the knife the defendant had in his hand; that the defendant was waving the knife at Cacucci, who drew his gun because he was afraid the defendant was about to stab him; and that at the time the defendant was five feet from Cacucci. The trial court also found that the defendant then threw his gun away and about ten seconds later he dropped the knife to the floor.

The defendant contends he was not proven guilty beyond a reasonable doubt.

Section 12-5 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par. 12-5) provides:

"[a] A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful."

Section 4-6 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 4-6) defines reckless conduct as follows:

"A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning."

The Committee Comments following Section 12-5 (Smith-Hurd, Ann. Stat., ch. 38, par. 12-5) state that the offense of reckless conduct may be committed "by any means"; and that bodily harm is not required, only the "endangering of bodily safety" must be proved. In reference to Section 4-6, the Committee stated that the conduct is reckless, without regard to whether it is otherwise lawful or unlawful. By waving the knife at

Cacucci in a manner to put Cacucci in fear of being stabbed, the defendant was guilty of reckless conduct.

The defendant states that there is a discrepancy in the testimony of Police Officer Cacucci to the effect that the defendant was only six feet away from him when the defendant started toward Cacucci with his left hand extended and the knife out and the testimony of Police Officer Bednarowski to the effect that the defendant was about fifteen feet away from Cacucci when he had the knife in his hand. The defendant states that the court should accept Bednarowski's testimony that the defendant and Cacucci were fifteen feet apart and, therefore, this fact together with the fact that Cacucci was armed with a revolver "seemed to preclude any risk to Officer Cacucci that his bodily safety was endangered." However, the trial court found that at the time the defendant was only five feet away from Cacucci and that Cacucci was afraid that the defendant was about to stab him.

In a bench trial, it was for the trial court to determine the question of fact of whether the distance between the defendant and Cacucci was close enough to result in a substantial risk to the bodily safety of Cacucci. People v. Mitchell, 9 Ill.App.3d 1015, 293 N.E.2d 683; People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378.

The defendant relies upon People v. Humphrey, 129 Ill.App.2d 404, 262 N.E.2d 721, to sustain his argument that "the evidence is highly unsatisfactory in attempting to prove the defendant guilty beyond a reasonable doubt" and, therefore, the judgment should be reversed. However, the Humphrey case does not sustain the defendant's contention. There the court affirmed the defendant's conviction of armed robbery and held "[a] court of review will not disturb a finding of guilty unless the evidence is so unreasonable,

improbable or unsatisfactory as to justify a reasonable doubt of defendants' guilt." In the case at bar, the evidence is not so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt and, therefore, the trial court properly found the defendant guilty of reckless conduct. People v. Thomas, 1 Ill.App.3d 139, 275 N.E.2d 253; People v. Norris, 118 Ill.App.2d 406, 254 N.E.2d 304, petition for leave to appeal denied 43 Ill.2d 398.

The defendant argues that the acts comprising the offense of reckless conduct and the offense of simple assault arose from the same "act or transaction" and, therefore, the trial court erred in finding the defendant guilty of simple assault and imposing a \$10 fine. The parties agree that the fine was "later vacated." This fact raises the question of whether there was a final judgment in the simple assault case. The final judgment in a criminal case is the sentence. "Judgment" means an adjudication by the trial court that the defendant is guilty or not guilty and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court. People v. Rose, 43 Ill.2d 273, 278, 253 N.E.2d 456. In People ex rel. Filkin v. Flessner, 48 Ill.2d 54, 268 N.E.2d 376, the court held it could not entertain the appeal from the finding of guilty because no sentence was imposed.

In the case at bar the record discloses that although the defendant was found guilty of the offense of simple assault and fined \$10, the fine was later vacated. The vacation of the fine left the finding of guilty of simple assault, but left no final judgment from which the defendant could appeal. Therefore, the appeal from the finding of guilty of simple assault must be dismissed.

After the trial court found the defendant guilty of reckless conduct, the defendant's application for probation was granted and the defendant was placed on one year probation on condition that the defendant serve the first two months in the House of Correction. Although not argued by the parties, this sentence violates the provisions of the Unified Code of Corrections.

The defendant's case has not reached the stage of final adjudication and, therefore, the Unified Code of Corrections is applicable. People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269. The Unified Code of Corrections provides that when a defendant is placed on probation he can be committed to a period of imprisonment only under Article 7 (Ill.Rev.Stat. 1972 Supp., ch.38, par. 1005-6-3(d)). Article 7 of the Unified Code of Corrections (Ill. Rev.Stat. 1972 Supp., ch. 38, par. 1005-7-1) provides only for periodic imprisonment. In the case at bar the defendant was not granted periodic imprisonment and, therefore, the condition that the defendant spend the first two months in the House of Correction is improper and must be vacated. People v. Claudio, 13 Ill.App.3d 537, 300 N.E.2d 791.

The appeal from the finding that the defendant was guilty of the offense of simple assault is dismissed. The judgment finding the defendant guilty of the offense of reckless conduct is modified by eliminating the condition that the defendant serve the first two months in the House of Correction and as modified the judgment of the circuit court of Cook County is affirmed.

APPEAL DISMISSED AS TO OFFENSE
OF SIMPLE ASSAULT; JUDGMENT AS
TO OFFENSE OF RECKLESS CONDUCT,
AS MODIFIED, IS AFFIRMED.

* EGAN, P.J. took no part.

58391



17 I.A. 412^{3D}

PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
OTIS ELDER (Impleaded),	)	HON. SAUL A. EPTON,
	)	Presiding.
Defendant-Appellant.))	

*PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Otis Elder (hereinafter defendant) was indicted with Henry Nelson and Floyd Davis for the offense of armed robbery, in violation of section 18-2 of the Criminal Code. Ill.Rev.Stat. 1971, ch. 38, par. 18-2. After a bench trial all three men were found guilty as charged; defendant was sentenced to a term of seven years to twenty-five years, and Henry Nelson and Floyd Davis were each sentenced to a term of five years to seven years. Defendant alone prosecutes this appeal, contending that he was denied effective assistance of counsel at trial.

The State's evidence disclosed that three men, identified as defendant, Nelson and Davis, entered a grill on the south side of Chicago on December 7, 1971, and, at gunpoint, took paper currency and a number of quarters from the cash register. The robbers fled in a waiting automobile near the grill; their departure was observed by a bystander; the robbery, the description of the automobile and its license number were reported to the police; and the defendant, Nelson and Davis were apprehended by police in the automobile. Those three men were identified in a police line-up held shortly after the robbery by the attendant in charge of the grill at the time of the robbery, and defendant also was identified in the line-up by the bystander who observed the robbers' departure from the scene. The police recovered a

large number of quarters from one of defendant's companions upon their arrest, and the police also recovered a revolver which had been discarded from the fleeing automobile, which weapon was identified at trial by the grill attendant.

Defendant's contention on this appeal centers primarily on the failure of his court-appointed counsel to move for a severance from the trial of his co-defendants, in light of Floyd Davis' testimony at trial that the defendant and Nelson committed the robbery while Davis was merely an innocent bystander during the incident. At the close of the State's evidence, and prior to co-defendant Davis' being called to the stand, the following colloquy occurred between the court, the defendant's counsel, and the counsel representing Nelson and Davis:

"THE COURT: Put on your defense.

"MR. WALTER (defendant's counsel): After discussing with Mr. Elder his right to testify, we are at this time resting on behalf of Mr. Otis Elder. Prior to either or both of the co-defendants taking the witness stand, I would ask for a ruling.

"MR. SHEPPARD (Nelson-Davis' counsel): I think that would be very fair in the interest of justice.

"THE COURT: Approach the bench.

"THE COURT: What is your motion, Mr. Walter?

"MR. WALTER: I am anticipating testimony I don't believe that Mr. Elder should be convicted on the basis of other defendant's testimony, when he chooses to remain silent.

"THE COURT: Yes.

"MR. WALTER: I am anticipating what may come from your --

"THE COURT: What is your motion?

"MR. WALTER: I am asking for a decision of guilt or innocence before the testimony.

"THE COURT: I will preserve (sic) my ruling.

"MR. SHEPPARD: May I bring out to the Court, in the interest of fair play to a fellow lawyer, I have advised him as to the nature of my defense and general substance of what the testimony of my defendant was going to be. And predicated upon my discussion during the recess with counsel, he has made the motion to your Honor.

"THE COURT: Very well. I will reserve my ruling. Proceed with the defense."

This was a bench trial. The trial court had heard substantial evidence directly implicating the defendant in the armed robbery. It was not until the close of the State's evidence that defendant's counsel first learned that co-defendant Davis intended to raise the defense that the defendant and Nelson committed the robbery, while Davis was merely present in the grill at that time as an innocent bystander. Under the circumstances, the filing of a motion for a severance at that stage of the proceeding would not have been seasonable. (People v. Watt, 380 Ill. 610, 44 N.E.2d 580.) However, defendant's counsel protected his client's interest by then consulting with the defendant, by resting the defendant's case, and by requesting the court to make a finding as to defendant's guilt or innocence before any co-defendant's testimony was heard. The record further discloses that defendant's counsel also raised a "continuing objection" as to co-defendant Davis' testimony and that at the close of that testimony counsel moved that the court strike the testimony as it related to defendant.

Defendant also advances in support of this contention on appeal the failure of his trial counsel to cross-examine co-defendant Davis, his failure to argue in defendant's behalf at the close of all the evidence, and his failure to offer substantial evidence in mitigation of the offense. As noted above, defendant's counsel made objections to Davis' testimony as it pertained to defendant. Counsel was also

denied the opportunity to be supplied with a pre-sentence report on the defendant, and his motion to continue the date for sentencing beyond the date of the finding of guilty was denied. Finally, the fact that defendant's counsel made no closing argument is immaterial; during the course of the trial, counsel extensively cross-examined the State's main witness, and the trier of fact heard that evidence.

Defendant's contention on this appeal is a criticism of trial counsel's tactics, strategy and professional judgment at trial, which a court of review is hesitant to condemn as incompetency of counsel. (People v. Wesley, 30 Ill. 2d 131, 136, 195 N.E.2d 708.) Under the circumstances of this case, we find that defendant's court-appointed trial counsel represented defendant in a competent and lawyer-like manner. Defendant's contention is without merit.

The cases cited by defendant in support of this contention are inapposite to the instant situation: People v. Clark, 17 Ill. 2d 486, 162 N.E.2d 413; People v. Chatman, 36 Ill.2d 305, 223 N.E. 2d 110; People v. Odom, 71 Ill. App. 2d 480, 218 N.E. 2d 116.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

EGAN, P.J. took no part.



58514

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
DENNIS COOPER,	)	HONORABLE MAURICE W. LEE,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM * (First Division, First District):

Defendant, Dennis Cooper, was convicted following a bench trial of public indecency and sentenced to 120 days in the House of Correction. (Ill.Rev.Stat. 1971, ch. 38, par. 11-9.) He contends that he was not proved guilty beyond a reasonable doubt and that hearsay evidence was admitted over his objection.

The complainant, who was 16 years old, testified that on October 19, 1971, she was playing badminton on the street with her sister at 5445 South Newland in Chicago when she saw the defendant coming from Archer Avenue swerve out of the way of another car coming from 54th Street. The driver, whom she identified in court as the defendant, waved his hand and she looked inside the car and saw the defendant with his penis exposed. She said she saw "his hands [sic] down to his knees." Defendant was stopped for "about a minute." She took the license number of the car and ran into the house and told her mother, who told her to wait until her father, a policeman, came home since he would know whom to notify. Later the same day, she saw the defendant parked on Archer, between Newland and Sayre, at about 7:00 p.m. She testified that South Newland is a narrow street, that there was a car parked on her side, but not on the other, and that the defendant had gone by once before.

The complainant's mother testified, over objection, that on October 19, 1971, about 5:30, her daughter ran in very frightened and upset and said there was a man riding around with his pants

* Mr. Justice Burke took no part.

down. When she asked her daughter what she meant by this, her daughter said, "No pants down -- I mean -- no pants on," that she could see everything.

The defendant testified that he was in the vicinity on his way home from work, that when he got on Newland Avenue, heading north, he saw another car going south and had to swerve over to the side to let him pass and as soon as the car passed, he continued on. He did not stop and was going about one or two miles per hour. He arrived home about 6:00 p.m. and watched T.V. He denied exposing himself to the complainant or that he made any motion toward the complainant, and said he didn't really notice that she was there.

His wife testified that her husband came home at 6:00 p.m. or a little after, had dinner and watched T.V.

Bruce Wheeler testified for the defendant that he is the "night pastor of Chicago" and has known the defendant over seven years and the defendant has always been truthful with him.

Chicago Police Officer John Foster testified that he arrested the defendant on October 20, 1971, and that the defendant denied that he exposed himself to the complaining witness.

Defendant bases his entire argument on analogy to two cases, People v. Grear, 42 Ill.2d 578, 248 N.E.2d 661, and People v. Neidhofer, 126 Ill.App.2d 65, 261 N.E.2d 559. In Grear, a 17-year-old girl was standing on a street corner when the defendant drove by at five to ten miles an hour, exposed. She took his license number and summoned a policeman, who apprehended the defendant a short distance away. Another girl was present and, although she did not testify, it was brought out on cross-examination that the other girl "did not notice anything unusual." The driver said nothing to the girl and made no attempt to attract her attention. The Supreme Court reversed, noting that the complainant had "only a fleeting opportunity" to view the driver, that the other girl saw

nothing out of the ordinary and that taking down the license number was not "substantial corroboration" of the charge of indecent exposure. In Neidhofer, a 17-year-old girl testified that the defendant, who was in the front passenger seat of his parked truck, called her sister over to ask directions. The sister walked to within two or three feet of the truck, gave directions to the defendant, but as she walked away, the defendant asked her where the expressway was. As the sister was telling him, the complainant "thought something was going on" so she went in front of the truck, looked in and saw the defendant exposed. She then told her sister that the defendant wasn't wearing any pants and they left. Following Greear, the Appellate Court reversed and found it significant that one of the girls did not see any exposure and that it was this girl that received defendant's attention and to whom he had addressed his inquiry.

The facts in the case at bar are distinguishable, however. There was testimony in this case that defendant had driven by a previous time and that, unlike the defendant in Neidhofer, he deliberately attracted the attention of the complaining witness by waving to her. The victim testified that he was stopped for "about a minute," not for a fleeting moment as in Greear. It is also significant that the complainant's testimony is corroborated by her prompt complaint to her mother. The fact that the other girl did not testify, although it is unexplained, is not fatal to the State's case. The judge obviously believed the State's witnesses and their evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt. The credibility of witnesses and the weight to be given their testimony is generally better left to the trier of fact who sees and hears those witnesses. People v. Hampton, 44 Ill.2d 41, 45, 253 N.E.2d 385.

Defendant claims that he was prejudiced by the admission of hearsay evidence. The trial court explicitly said it was admitting

the testimony based on the opinion of the Supreme Court of Illinois in People v. Carpenter, 28 Ill.2d 116, 121, 190 N.E.2d 738, where hearsay evidence was defined as testimony of an out-of-court statement offered to show the truth of the matters asserted, thus resting for its value upon the credibility of the out-of-court asserter. Here the "out of court asserter" was the complaining witness, who had already testified under oath and was available for cross-examination. The defendant was therefore not deprived of his right to cross-examine her, the out-of-court declarant. Hence, there was no violation of the hearsay rule when the court admitted the mother's in-court testimony of her daughter's out-of-court statements since their value, while they rested upon the daughter's credibility, could be tested by cross-examining the daughter directly, she being in court and available for cross-examination. This was not error. (People v. Carpenter, 28 Ill. 2d 116, 121, 190 N.E.2d 738.) Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

ABSTRACT ONLY.



58582

MANLEY A. PAGE,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
ORVILLE HELLAND,	)	HON. DAVID A. CANEL,
	)	Presiding.
Defendant-Appellee.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Manley A. Page brought this action against Orville Helland on May 22, 1968, for damages allegedly the result of a motor vehicle collision on June 15, 1966. Following a bench trial on October 26, 1972, judgment in favor of the plaintiff for \$2,000 was rendered. Plaintiff appeals, contending that his petition for change of venue was wrongfully denied. His petition filed June 22, 1972, stated in relevant part as follows:

"2. That on May 31, 1972, this cause was assigned to Judge David Canel for trial and Petitioner appeared before said Judge ready to proceed with the trial of this cause;

"3. That on the aforesaid date, a final pre-trial conference was held in chambers before said Judge David Canel, as a result of which Petitioner and his client fear that Plaintiff will not receive a fair trial from said judge, because he is prejudiced against the Plaintiff or his attorney and in favor of Defendant or his attorney."

The issue is whether the petition was timely, coming as it did three weeks after the pretrial conference.

We note first that according to the "statement of facts" contained in plaintiff's Brief, the trial judge recommended a settlement of \$2000 which plaintiff rejected because another judge had earlier recommended \$5000, whereupon the judge called

*Mr. Justice Hallett did not participate.

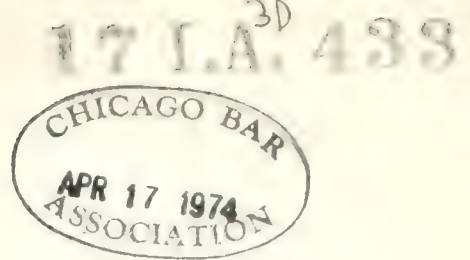
defendant's insurance carrier, Allstate Insurance Company, discussed the case at length with Allstate, and was overheard to say he could prevail on plaintiff if the company would authorize payment. However, the record on appeal contains no verbatim transcript or other report of proceedings (see Ill. Rev. Stat. 1971, ch. 110A, par. 323(c)) either of the pretrial conference on May 31 or the hearing on June 22. This "statement of facts" therefore lies outside the record and may not be considered on this appeal. People v. Karabatsos (1971), 131 Ill. App. 2d 33, 35, 266 N.E.2d 764.

Although a petition for a change of venue should be filed at the earliest practicable moment, whether it is timely is not simply a matter of mechanical computation of days lapsed since the alleged prejudice is discovered, but rather depends upon an analysis of whether the court has considered a substantive issue in the case. (People v. Chambers (1956), 9 Ill. 2d 83, 90, 136 N.E.2d 812 and Jones v. Jones (1963), 40 Ill. App. 2d 217, 230-231, 189 N.E.2d 33.) A similar situation was recently presented in the case of Fennema v. Joyce (1972), 6 Ill. App. 3d 108, 285 N.E.2d 156, which held timely a motion for change of venue filed three days after a pretrial conference. The motion stated that during the pretrial conference, the judge had "disparaged" plaintiff's claim and personally recommended that defendant waive his jury demand and proceed with a bench trial on the issue of damages. This court noted that although there was no transcript of the pretrial conference, the only order resulting from the pretrial conference was the setting of the trial date for September 29 and the order reflected that the defendant in fact did waive his jury demand during the pretrial conference. Although the pretrial conference was held on September 25, and the case tried on September 29, the court held

the filing of the petition for change of venue on September 28 was nevertheless "not untimely" since plaintiff acted within three days of discovering the prejudice, no ruling of substance had been made and no hearing on the merits had commenced, although it stopped short of recognizing an absolute right to a change of venue following a pretrial conference.

The petition in the case at bar was likewise, we hold, timely filed. While the petition here was filed three weeks rather than three days after the conference, it is most significant that while Fennema's petition was filed one day prior to trial, the petition here was filed four months prior to trial. Under these circumstances it is unlikely that it was filed for the purpose of delay or to avoid trial and the fact that the trial had been set for late October helps explain the three weeks' delay in filing the petition for change of venue. Nothing in the record suggests that the court had ruled on any substantive issue or that any hearing on the merits had occurred. Rather, the pretrial conference appears to have been a typical informal hearing at which no rulings on the merits were sought or made. Under these circumstances, the single fact that three weeks had elapsed between the time the alleged prejudice was discovered and the time the petition was presented is insufficient to defeat the right to a change of venue. Accordingly, the judgment of the circuit court of Cook County is reversed and the cause is remanded with directions to grant the petition for a change of venue. Little v. Newell (1973), 14 Ill. App. 3d 564, 302 N.E.2d 739.

Reversed and remanded
with directions.



NO. 57649

PEOPLE OF THE STATE OF ILLINOIS	)	APPEAL FROM
ex rel. LAWRENCE MOYE,	)	CIRCUIT COURT
	)	COOK COUNTY
Relator-Appellant,)	
)	
vs.)	
)	
RICHARD ELROD, Sheriff of Cook	)	HONORABLE
County, Illinois,	)	JOSEPH A. POWER,
	)	PRESIDING.
Respondent-Appellee.)	

PER CURIAM:

Lawrence Moye, relator, appeals from a dismissal of his petition for a writ of habeas corpus filed on March 17, 1972, to attack his confinement pursuant to an extradition warrant charging him with being a fugitive from justice from the State of Ohio. He argues that the Ohio indictment, upon which the warrant was based, was substantially defective in that the Ohio indictment, as reflected by the copy attached to the warrant, contained merely the typewritten name of the Ohio grand jury foreman, but not his actual signature, which, according to the relator, Ohio law requires.

At a hearing in the trial court, the judge noted that the indictment in question was a copy rather than the original, but that it was undisputed that the copy of the indictment contained the name "C. L. Berens" merely typewritten on the face of the indictment under the words, "A TRUE BILL," and that the personal signature of the grand jury foreman did not appear anywhere on the copy of the indictment filed with the extradition papers. Attached to the warrant, signed by then Illinois Governor Richard B. Ogilvie, were the following papers: A request for interstate rendition, signed on behalf of Ohio Governor John J. Gilligan, certifying that relator stood charged with escape in violation of Section 2901.111, Ohio Revised Code, in Hamilton County, Ohio; a copy of the indictment charging Moye with escape on July 4, 1971; a

warrant for Moye's arrest on the indictment dated January 14, 1972; a request by the prosecuting attorney of Hamilton County, Ohio, asking the Ohio Governor to issue a requisition upon the Illinois Governor for the apprehension of Moye in connection with the indictment; a certificate of the clerk of the Court of Common Pleas of Hamilton County, Ohio, certifying the indictment, warrant, and prosecuting attorney's request upon the Governor.

Relator's claim is that the Ohio indictment is void because the name "C.L. Berens" was merely typewritten under the words "A TRUE BILL" on the copy of the original indictment accompanying the extradition papers, whereas Ohio law requires the actual signature of the grand jury foreman on the original. Cited for this proposition is Kennedy v. Alvis (1957), 76 O.L.A. 132, 145 N.E. 2d 361, a decision of the Court of Common Pleas of Franklin County, Ohio, holding that absence of the grand jury foreman's signature as provided by Ohio law rendered the indictment a nullity. However, the authority of Kennedy v. Alvis is weakened by the existence of an earlier decision of a higher Ohio court, Pierpont v. State (1934), 49 Ohio App. 77, 195 N.E. 264, holding that an indictment signed by the grand jury foreman but inadvertently omitting the essential words "A TRUE BILL" could be amended without error prejudicial to the defendant. For this reason, the Supreme Court of Arizona recently declined to follow Kennedy v. Alvis, and instead followed Pierpont v. State, stating (Quintana v. Myers (1972), 108 Ariz. 95, 492 P. 2d 1202, at 1203):

"Kennedy, though decided 23 years after Pierpont, appears to have been decided by a trial court (Court of Common Pleas) which must have overlooked the Pierpont case decided by the Ohio Court of Appeals, whose precedents it was bound to follow."

We, therefore, conclude, following Pierpont v. State, that the indictment in the case at bar sufficiently complied with Ohio

law and was not void because of the absence of the actual signature of the grand jury foreman. See, also, Annot., 17 ALR 3d, 1251. The defect, therefore, was a technical one which could subsequently be cured by amendment as was done in Pierpont v. State, supra.

It has been held that the technical sufficiency of an indictment cannot be inquired into by the State of Illinois in a habeas corpus proceeding involving the extradition of a person in custody in Illinois to another State, since to do so would conflict with the purpose of the Uniform Criminal Extradition Act (Ill. Rev. Stat. 1971, ch. 60, par. 20), the purpose of which is to afford a quick and speedy remedy in such cases. In People ex rel. Banks v. Farner (1968), 39 Ill. 2d 176, 180, the court stated:

"There is no question in this case that the relator stands charged with a crime in the State of Alabama and is a fugitive from justice from that State. The only purpose of extradition is the return of the fugitive to the place of the alleged offense; it is not a judicial proceeding to inquire into the merits of the charges."

Likewise, in People ex rel. Jolley v. Koepfel (1969), 42 Ill. 2d 257, 259, 246 N.E. 2d 247, the court reiterated that the purpose of the extradition statute is the return of the fugitive, stating (42 Ill. 2d 257, 260): "The proceeding is not attended with the rules and formalities of an inquiry into the merits of the charges, and the statute should be given a liberal application to accomplish a return of the fugitive summarily." Therefore, in accordance with the spirit of the Uniform Criminal Extradition Act as clearly set forth in the above opinions, we hold the trial judge properly denied the writ of habeas corpus.

Affirmed.

Second Division. Downing, J., did not participate.

Publish abstract only.



No. 58721

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
vs.	)	COURT OF COOK COUNTY.
)	
EMITT R. JORDAN,	)	Hon. Joseph A. Power,
	)	Presiding.
Petitioner-Appellant.)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Petitioner, Emmitt R. Jordan, appeals from an order of the circuit court of Cook County dismissing his pro se petition under the Post-Conviction Hearing Act. Petitioner's sole contention on appeal is that the trial court erred in refusing to provide his court-appointed counsel with a transcript of the entire trial proceedings.

On February 28, 1963, defendant, Emmitt R. Jordan, entered pleas of guilty to indictment 63-456, charging murder for which he was sentenced to a term of 45 to 60 years, and to indictment 63-459, charging robbery, for which he was sentenced to a concurrent term of 45 to 60 years. On the same day he pleaded guilty to indictment 62-2973, charging armed robbery, and was sentenced to 5 to 15 years, and pleaded guilty to indictment 62-2972, charging armed robbery, and was sentenced to 5 to 15 years. The latter two sentences were to run concurrently with each other, but were to run consecutive to the 45 to 60 years sentence. No appeal was taken from these convictions. However, on January 24, 1972, petitioner filed his pro se petition seeking a "reduction of sentence" based on the following reasons as set out in the petition:

- "1. That this petitioner was sentenced under criminal indictment 63-456; 63-459; concurrently, while criminal indictment 62-2973 and 62-2972 function independent to each other, totally inconsistent with the constitutional provision Art. 2, Sec. 11, Ill. Const. which provided that no penalty shall act in corruption of blood;
2. That indictments 63-459 and 63-456 act together, in sentences of sufficient duration to more than punish the offenses named, while indictments 62-2972 and 62-2973 act in an independent manner from the aforementioned

indictments, though none of the indictments speak of joinder offenses within the language of the Statutes; See; Due Process and equal protection of the law, Amend. 14, Sec. 1, U.S.C."

The State moved to dismiss the pro se petition and, along with the motion, filed a document entitled "Excerpt of Proceedings" had on February 28, 1963. The excerpt consisted of a single page of colloquy at which defendant was sentenced. Also attached to the motion were certified copies of the judgments of conviction in the four cases.

When the pro se petition came on for hearing, the assistant public defender informed the trial court that the court reporter had transcribed only that portion of the plea transcript which reflected the sentencing. After further stating that he "would need the entire plea transcript to determine whether or not, aside from the sentencing aspect, there were any other constitutional errors," defense counsel requested a continuance for that purpose. The State maintained that the entire transcript was unnecessary because the pro se petition raised only a question concerning the sentences. The trial court refused the request for a continuance or to order that the entire transcript be prepared, and dismissed the petition.

Defendant relies primarily on People v. Eatmon (1970), 47 Ill.2d 90, 264 N.E.2d 194, where the Supreme Court held, at p.92, that denial of a free copy of the trial transcript was inconsistent with its Rule 651(c), which "implicitly provides that a free transcript, if not previously obtained, must be supplied to assist appointed counsel in determining whether errors of constitutional magnitude were present in the original proceedings." Also: see People v. Luechtefeld (1973), 11 Ill.App.3d 407, 296 N.E.2d 771.

The State maintains, however, that since the guilty plea occurred in 1963, the transcript in question "could not have contained any evidence of a substantial constitutional violation,

short of coercion or some other wrongdoing dehors the record, of which the prisoner never complained." In People v. Brown (1972), 52 Ill.2d 227, 287 N.E.2d 663, the Supreme Court rejected a similar contention. In that case, the prisoner's only claim of constitutional violation in his pro se post-conviction petition was that the trial court improperly refused to suppress certain evidence and, as here, the prisoner took no direct appeal. In holding that Rule 651(c) explicitly requires a showing that counsel has examined the trial record, the court stated at p.230:

"The State's second reply is that even if the attorney did not examine the trial record, 'such a reading by counsel would have not been of any benefit to the defendant,' the State reasoning that 'all trial error and matters arising from that record were either res judicata or waived as the appeal was taken by other than trial counsel.'"

"It is, of course, generally correct that claims which were or could have been presented on direct appeal may not later be raised in a petition for post-conviction relief. (Citation omitted) But the State's assumption that all trial errors would be res judicata or waived is gratuitous. To illustrate, this court, if fundamental fairness requires, may not permit the doctrine of waiver to be invoked in post-conviction proceedings on appeal. (People v. Hamby, 32 Ill.2d 291, 294.) Too, the purpose underlying Rule 651(c) is not merely formal. It is to ensure that all indigents are provided proper representation when presenting claims of constitutional deprivation under the Post-Conviction Hearing Act. (See People v. Garrison, 43 Ill.2d 121, 124.) The fulfillment of this design would not be encouraged were we to ignore the rule's nonobservance in those cases appealed to this court."

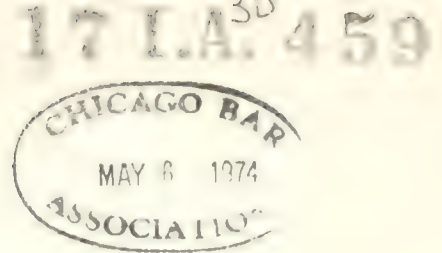
In the present case, it is obvious from a reading of the portion of the pro se petition quoted above that petitioner was unable to articulate even the most obvious of his grievances, namely that the 5 to 15 year sentences were to run consecutive to the 45 to 60 year sentences imposed. If we accepted the State's position that defendant has waived other issues by presenting only the "sentencing" issue in his petition, Rule 651(c) would be rendered meaningless. Counsel for defendant was required to review the record to determine if constitutional

error existed. He could not meet this requirement by reading only an excerpt of the transcript dealing with the sentences imposed. Under the facts and circumstances of this case, petitioner was entitled to the entire transcript and not simply that portion dealing with the issue raised in his petition.

For the reasons stated, the order of the circuit court of Cook County is reversed, and the cause is remanded for further proceedings not inconsistent with the holding of this opinion.

Order reversed and remanded.

DEMPSEY and McGLOON, JJ., concur.



58870

PEOPLE OF THE STATE	)	APPEAL FROM
OF ILLINOIS,	)	CIRCUIT COURT
	)	COOK COUNTY
Plaintiff-Appellee,)	
)	
v.)	
)	
MAUDELL CARTER,	)	HONORABLE
	)	JAMES A. GIOCARIS,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Maudell Carter, defendant, after a bench trial, was found guilty of the crime of armed robbery in violation of section 18-2 of the Criminal Code [Ill.Rev.Stat. 1971, ch. 38, par. 18-2], and was sentenced to a term of five to eight years.

Defendant's first argument on appeal is that the evidence was insufficient to establish her guilt beyond a reasonable doubt. At trial, Raul Cortez testified that on June 24, 1972, while his car was waiting at a stop light, the defendant and four other people came up to his car, opened the door, struggled with him and ripped his pants pocket, taking \$150. Cortez ran toward a nearby police station where he informed the police of what had occurred. When he and the police returned to the scene of the robbery he saw the defendant standing in a doorway and identified her as one of the offenders.

Chicago Police Officers Knollmueller and Pacella testified that on June 24, 1972, in the early morning hours, Cortez came into the Area 4 robbery headquarters in a highly excited state. His front pants pocket was torn open, and he said he had just been robbed at knife point. When the officers went to the scene of the robbery with Cortez he identified the defendant standing in a hallway. Defendant immediately ran up

to the third floor with the officers in pursuit. Defendant was apprehended as she was attempting to enter a room on the third floor.

This evidence was sufficient to support defendant's conviction even though she presented evidence to the contrary. A review of the entire record leads to the conclusion that there is no reasonable doubt as to defendant's guilt.

Defendant's only other argument on appeal is that her minimum sentence should be reduced to a term of four years. At that time, the minimum possible sentence for armed robbery was five years [Ill. Rev. Stat. 1971, ch. 38, par.18-2]. However, under the Unified Code of Corrections, armed robbery is a Class-1 felony [Ill. Rev. Stat. 1972 Supp., ch. 38, par. 18-2], the minimum possible sentence for which is a term of four years [Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1(c)(2)]. The State, in its brief, agrees that the defendant's minimum sentence should be reduced to a term of four years. After a complete review of the entire record, we believe that this is an appropriate case for this court to exercise its authority under Supreme Court Rule 615(b)(4) [Ill. Rev. Stat. 1971, ch. 110A, par. 615(b)(4)] to reduce defendant's minimum sentence to a term of four years.

Defendant's minimum sentence is reduced to a term of four years, and the judgment of the Circuit Court of Cook County, as modified, is affirmed.

Affirmed as modified.

THIRD DIVISION.
Justice Dempsey did not participate.



No. 58205

PEOPLE OF THE STATE OF ILLINOIS,))
))
 Plaintiff-Appellee,))
))
 v.))
))
 ALONZO FLYNN a/k/a CARL COLSTON,))
))
 Defendant-Appellant.))

APPEAL FROM THE
 CIRCUIT COURT OF
 COOK COUNTY

HONORABLE
 EARL E. STRAYHORN,
 PRESIDING.

*

PER CURIAM (First District-Fifth Division):

Defendant pleaded guilty to a two count indictment which charged him with unlawful use of weapons: Count I as a misdemeanor and Count II as a felony, in violation of section 24-1(a) (4) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a) (4).) He was sentenced to a term of one to two years. Defendant appeals, urging (1) that Count II of the indictment does not state an offense of unlawful use of weapons as a felony; (2) that he was not properly admonished as to the nature of the charge as required by Supreme Court Rule 402; and (3) that his minimum sentence should be reduced under the Unified Code of Corrections.

Defendant's first argument on appeal is that Count II of the indictment does not state an offense for unlawful use of weapons as a felony. Count II charged that defendant knowingly carried on or about his person a concealed weapon having been convicted of a felony, Information No. 69-343, possession of narcotics, within five years. Defendant has filed a supplemental record in this court which demonstrates that his conviction under Information No. 69-343 was for possession of marijuana under section 22-3 of the Criminal Code. Ill. Rev. Stat. 1967, ch. 38, par. 22-3.

The classification of marijuana as a narcotic drug under section 22-3 of the Criminal Code (Ill. Rev. Stat. 1967, ch. 38, par. 22-3.) has been held by the Supreme Court to be invalid. (People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407.) All convictions under that

Mr. JUSTICE ENGLISH did not participate.

statute are invalid and McCabe has been applied retroactively. (People v. Hudson, 50 Ill. 2d 1, 276 N.E.2d 345; People v. Pullum, 10 Ill. App. 3d 745, 295 N.E.2d 315.) A defendant's prior conviction for possession of marijuana under section 22-3 of the Criminal Code cannot be used for the subsequent trial for any purpose. People v. McGaha, 10 Ill. App. 3d 1051, 295 N.E.2d 476.

In the case at bar, defendant's conviction under Information No. 69-343 for possession of marijuana was invalid under McCabe and could not therefore be used for any purpose at any subsequent trial. Defendant's plea of guilty on September 15, 1972, was entered after the McCabe decision had been rendered on October 15, 1971. Since defendant had not been convicted of a felony within five years, Count II of the indictment was insufficient to charge him with unlawful use of weapons as a felony, but it was, however, sufficient to charge defendant with unlawful use of weapons as a misdemeanor. The failure of Count II to charge a felony does not necessarily invalidate defendant's plea of guilty. It did charge defendant with unlawful use of a weapon as a misdemeanor and was, in effect, a duplication of Count I of the indictment.

Defendant's second argument on appeal is that his plea of guilty was improper, in that the trial judge failed to inform him as to the nature of the charge under Supreme Court Rule 402. (Ill. Rev. Stat. 1971, ch. 110A, par. 402.) The basis of defendant's argument is that the trial judge failed to expressly inform defendant that he was charged under the felony section of unlawful use of weapons. Even if this argument were considered, it is without merit since the trial judge specifically advised defendant that he could be sentenced to the Illinois State Penitentiary for a term of from one to five years under the charge of unlawful use of weapons. However, since we hold that both Counts I and II of the indictment charged defendant with unlawful use of weapons as a misdemeanor and that defendant's plea of guilty was entered only as to that charge, this argument is rendered moot.

A review of the record indicates that the trial judge substantially

complied with Supreme Court Rule 402. (Ill. Rev. Stat. 1971, ch. 110A, par. 402.) Prior to his plea of guilty, defendant was specifically admonished that he was charged with the offense of unlawful use of weapons and that upon conviction he could be sentenced to a term of from one to five years, or fined a maximum of \$500 or/and sentenced to an institution other than the penitentiary for a maximum term of one year or both fined and imprisoned. Defendant's plea of guilty was knowingly and voluntarily entered and is therefore valid. However, since defendant's sentence of one to two years is in excess of the maximum possible statutory penalty for the offense of unlawful use of weapons as a misdemeanor, we remand this case to the trial court for resentencing.

The judgment of the circuit court except for the sentence, is affirmed, the sentence is vacated, and the cause is remanded to the circuit court with directions to resentence defendant upon his conviction for unlawful use of weapons as a misdemeanor.

Judgment affirmed,
Sentence vacated and cause remanded to the circuit Court
with directions.



No. 58259

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
v.)	_____
)	
GREGORY HALL,	)	HONORABLE
	)	JAMES D. CROSSON
Defendant-Appellant.	)	PRESIDING

PER CURIAM * (First District, Fifth Division):

Defendant, originally charged with the crime of robbery, in violation of section 18-1 of the Criminal Code (Ill. Rev. Stat. 1967, ch. 38, par. 18-1), pleaded guilty on October 16, 1969 and was placed on probation for a period of three years, conditioned on the first four months being served in the County Jail.

Subsequently, defendant on October 23, 1969 was convicted of theft and, after a hearing on a rule to show cause, his probation was revoked and he was recommitted to probation for four years, the first year to be served in the House of Correction. Thereafter, on February 16, 1972, another hearing on a rule to show cause was held after he had again been convicted of theft and also had a narcotics charge placed against him. His probation was revoked and he was sentenced to a term of one to four years on the original robbery conviction.

Defendant's sole contention on appeal is that the court, in the rule to show cause hearing of February 16, 1972, failed to admonish him of his rights under Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) before accepting his plea of guilty to the violation of probation as therein charged.

OPINION

At the February 16, 1972 hearing on the rule to show cause the prosecutor informed the trial court of the prior

* Mr. Justice English did not participate.

convictions for robbery and theft and the sentences therefor. He then informed the court of the 30 day sentence for the second conviction of theft and that a narcotics charge was pending against defendant. At the request of the court defendant was questioned by his attorney and in answers thereto he admitted his second conviction for theft and that he received a 30 day sentence.

Defendant now contends that under the holding of People v. Pier, 51 Ill.2d 96, 281 N.E.2d 289 (opinion filed on March 21, 1972), he was entitled to an admonition by the court under Rule 402 before his guilty plea was made. In Pier, defendant was charged with "a violation of probation" and he contended that his admission of a probation violation was induced by a promise of an assistant State's attorney to recommend a sentence different from the one imposed. The Supreme Court of Illinois found the admission was made involuntarily and stated at page 100:

"Justice demands that he also be entitled to the protection of the same due-process requirements which pertain to pleas of guilty when he waives his right to a judicial determination of the charge that he violated his probation and confesses or admits the charges of the revocation petition. If he does so in reliance upon an unfulfilled promise by the State's Attorney, then his confession or admission of the charge is not voluntary for the same reason that a plea of guilty entered in reliance upon an unfulfilled promise of the State's Attorney is not voluntary." (Emphasis added.)

We note that there is no mention made in Pier of admonitions under Rule 402, nor was there any finding by the court that, if the admissions to the charges of the revocation petition had been voluntary, the admonitions under Rule 402 would be required.

In People v. Bryan, 5 Ill.App.3d 1006, 284 N.E.2d 706 (4th Dist.), cited by defendant, a probationer was found

guilty of deceptive practice, a violation of the terms of his probation. As a result probation was revoked and he was sentenced to 60 days in the county jail. Thereafter, another report was filed alleging a failure to report to the probation officer, a departure from the State of Illinois and the non-payment of monthly sums on his court costs. At the revocation hearing defendant's counsel conceded the violations. The court, on appeal, found that defendant was not admonished in accordance with Rule 402 and that, because of the Pier case, this constituted reversible error.

Similarly, in People v. Watkins, 10 Ill.App.3d 875, 295 N.E.2d 546 (4th Dist.), (petition for leave to appeal denied Sept. 26, 1972), also cited by defendant, because of a failure to report to his probation officer and because of an absence from the State, defendant's probation was revoked. At the revocation hearing, defendant's counsel admitted defendant's violations. The court, relying on Pier, found that due process requirements pertaining to pleas of guilty necessitated a Rule 402 admonition.

The Bryan case derived some support from obiturn dictum found in the case of People v. Tempel, 131 Ill.App.2d 955, 959, 268 N.E.2d 875, wherein it was stated:

"This record demonstrates that counsel admitted the violation (of probation) without protest from defendant. Undoubtedly, it would be much preferred that the substance of the procedure set forth in Supreme Court Rule 402, relating to pleas of guilty, be followed so as to ascertain from the defendant his personal admission and to have the record reflect that there is a factual basis for such admission. Absent an admission by the defendant the State would be put to prove the violation as alleged."

Although the Tempel case also involved a violation of probation, the charge of burglary, which was the basis of the violation, had apparently not yet been proved.

In Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, the U. S. Supreme Court, in setting forth basic due process requirements for probation revocations, held that a probationer was entitled to a notice of the claimed violations, an opportunity to appear and present evidence, a conditional right to confront adverse witnesses, an independent judicial determination, and a written report of the hearing. It is significant that the question of defendant's right to admonishments on a plea of guilty is not included therein, and it is also noteworthy that no mention was made in Gagnon concerning Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, the decision which set forth the admonishments required before a guilty plea should be accepted.

Our review of the record does not support defendant's contention that his due process rights have been violated in the light of the standards set forth in either Pier, Watkins or Bryan. First, these cases were decided after the February 16, 1972 revocation hearing in the instant case. We believe that defendant received all of the procedural safeguards required at the time the hearing was held; see People v. Morales, 2 Ill.App.3d 358, 359, 360, 276 N.E.2d 391, 392, where it was said:

"The procedure must establish that the defendant has been given notice and a copy of the charge, that he has had an opportunity to be heard and that a conscientious judicial determination has been made in accord with procedural methods which include the right to counsel and a reasonable time to prepare a defense. People v. Walker, 122 Ill.App.2d 461, 259 N.E.2d 304."

Secondly, we note that Pier was decided on the basis of what was, in effect, an involuntary plea based upon an unfulfilled promise of the prosecutor to recommend a different sentence. The court stated that there was a deprivation of due process requirements because, by the involuntary plea, defendant was precluded from a "right to a judicial determination

of the charge that he violated his probation." Here, defendant having already been convicted of the second theft, was not deprived of his right to a judicial determination of that charge. It is our belief that Pier, Bryan and Watkins are distinguishable in that each involved charges which, although admitted by counsel, had not been judicially determined.

For the reasons stated, we are of the opinion there was no abuse of discretion by the trial court here and, therefore, the judgment revoking defendant's probation is affirmed.

Judgment Affirmed.

(Publish abstract only.)

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171A.498

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
)	CIRCUIT COURT
Plaintiff-Appellee,)	COOK COUNTY.
)	
v.)	
)	
PAUL DUNIGAN,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIRST DIVISION, FIRST DISTRICT):

Following a bench trial, the defendant, Paul Dunigan, was convicted of rape and sentenced to not less than four nor more than six years in the Illinois State Penitentiary. (Ill. Rev. Stat. 1971, ch. 38, par. 11-1.) On this appeal, he contends he was not proven guilty beyond a reasonable doubt and that the mandatory four-year minimum sentence for rape violates article I, section 11 of the 1970 Constitution.

The complainant testified that she was 25 years of age, married with five children between the ages of one and six years. About 9:00 in the evening on November 10, 1971, she was washing clothes in the kitchen in the back of her first-floor apartment when she heard a lot of talking and "raucous" out in the hallway. Her six-year-old daughter opened the door and two men, one of whom she identified in court as the defendant, fell in the door. She saw that the night latch, which had been on the door, was on the floor. She told them to leave and as she was going to call the police, defendant took the baby out of her arms. She went to the telephone, defendant's companion started choking her and threw her on the floor, and dragged her to a little hall beside the bathroom and bedroom. Defendant was choking the baby and saying he was going to kill it and his companion had a sharp object (a fork, she later found out) at her neck, telling her to turn over and punching and choking her when she wouldn't. While she was fighting, punching and kicking him in the stomach and biting him, defendant came back and helped this man get her pants

off and this man put his penis in her vagina. Defendant had taken the baby out of her arms and was holding him, telling her he was going to kill the baby if she didn't do what they said; the children were screaming and running around. While the one man was on top of her having sexual intercourse in the hall, defendant pushed the children in the back, was standing there trying to push the other man off of her and the other man was saying, "I am not through, I am not through." Defendant then dragged her into the children's bedroom where one child was asleep on the bed. The older children were saying, "Don't kill my mother, don't kill my mother," and when the defendant put her in the room, the children were still in the back and he said, "Stay back there, nothing is going to harm your mother unless you come up to the front." She was "fighting a little" and "kicking" while the defendant had intercourse with her about 10 or 15 minutes. After the defendant reached his climax, he got up and the other man said he wasn't ready to go because he hadn't "did anything." Complainant ran to the back and took a pistol from under a mattress and pointed it at the defendant, but didn't shoot because the gun was faulty and she was afraid it would misfire, and because her little boy jumped in front of the defendant. She pulled the pistol back and defendant rushed her, so she threw it up under the bed. She then told the men, as she had several times, that her husband would be there any minute; defendant said he would come back and kill her if she called the police. When they left, she called her husband's friend, trying to get in touch with him, and immediately thereafter called the police who arrived in about 15 minutes. After talking with them, she went with the police to the corner of 67th and Marquette Road to a tavern and identified the defendant when he came outside with the police. She then went to a hospital for a physical examination.

She testified that the first time she saw the defendant

before this happened was about six months earlier at a laundromat. She told him where she lived and the next thing he was knocking at her door, but she did not open it, but instead told him she was married and never let him inside her apartment or had sexual relations with him. Nevertheless, the defendant came back, kept threatening her and saying he was going to "get" her one way or another. She denied telling a Mr. Booker the other man was named "Cliff." She also denied telling Booker she didn't want to press charges against the defendant but that her husband was making her do so because a neighbor had identified the defendant leaving the apartment. She said she had fights with her husband and he had hit her. She denied telling defendant's mother on the phone that she was only pressing charges because her husband wanted it that way; she did tell defendant's father when he came over to get the facts that most of what was happening was the other guy; she told him the whole incident, and he just walked out; he was very nice.

Betty Houston testified for the State that on November 10, 1971, she lived in the apartment directly above the complainant and that evening heard the complainant screaming, "Please let me alone." The screaming continued about 45 minutes. She did not call the police because she thought it was the complainant's husband, having heard those kind of noises twice previously from that apartment.

Chicago Police Officer David Oglesby, called by the State, testified that on November 10, 1971, he went to the victim's apartment and observed the burglary chain on the left side of the door had been broken. With the complaining witness, he went to a tavern, brought the defendant out of the tavern and the complainant identified him.

There was a stipulation that if the doctor who examined

the complainant on November 10, 1971, were called to testify, he would testify that his examination revealed:

"Number one, the pelvic genital area was within normal limits. Number two, there was no trauma, no lacerations, and no contusions. Number three, non-motile sperm present in the vaginal area.

"He would also testify that by and large 60 to 80 per cent of normal sperm remains motile two hours after intercourse, and that while non-motile sperm usually indicates that time has passed since the act of intercourse, the non-motile quality of sperm can be caused by abnormalities in the male having intercourse and/or by various conditions of the female's vagina during intercourse."

Melvin Booker testified for the defendant that he had known the complainant three or four years and in November or December of 1970, introduced her to the defendant in her hallway. The next day he brought the defendant there and did not see the defendant enter the apartment on either occasion. A couple of times he saw the defendant with the complainant walking on the street coming from the laundromat. Complainant told him in a conversation during the latter part of November, 1971, that she didn't want to press charges, her husband was making her, that she didn't really want to point the defendant out when the police officer took her to the tavern, but her neighbor had seen the defendant and she had to, that the other man, named "Cliff," had a fork to the neck or throat of the complainant's daughter and that "nothing took place," no one did anything to her, she ran in the room, brought her husband's pistol and told them to leave. On cross-examination, he admitted he had known the defendant two years and was a good friend. He also changed his testimony to state that on the second occasion, the defendant did go into the complainant's apartment. Defendant told him he and the complainant were "going together."

Annette Dunigan, called by the defense, testified that two or three days after her son's arrest, she talked by telephone

with the complainant who said her son "was a nice boy and she didn't want to press no charges but her husband was making her press charges," that "they" raped her and specifically that Paul, her son, had raped her. When she asked whether Paul hadn't been coming around there, complainant answered she had seen Paul occasionally and he had helped her go the the laundromat.

Dolton Dunigan, the defendant's father, called by the defense, testified that about two days after November 10, 1971, he went to the complainant's home and discussed what happened. She said she heard a noise outside her door, that two men busted the door down and they seemed to be fighting and turned on her. The other man had a fork. Defendant locked her children in the back room, the other man took her in the bathroom; the other man "tried to go with her" but "couldn't do anything. So then it come to Paul. So she said Paul went with her."

The defendant, Paul Dunigan, testified that he had met the complaining witness through Melvin (Booker), they had talked and then he and Melvin had left. The next day they went to her house, Melvin said he had to leave and the complainant asked him to come in. He did and after that he started going there "kind of usual," once a week. He had also seen her at the laundromat a couple of times and at the store a couple of times. On November 10, 1971, he stopped by the complainant's house, knocked on the door and a little girl came to the door and asked who it was. When he told her, she said to wait a minute. Complainant came to the door, asked who was there and when he identified himself, she opened the door and he saw she had a baby in her arms. They had been talking for about five minutes when a young man named Cliff came and asked if he knew if a certain person lived in the building. Then Cliff asked the complainant, who answered that no person by that name

lived there. Cliff started up the stairs, got to the second staircase and turned around. As they were going into the house, Cliff hit him on the back of the head with a pistol and he fell over a chair. As the defendant attempted to get up, Cliff hit him two more times. When he got up, he saw Cliff choking the complaining witness, who was hollering, "Paul, get the baby, Paul, get the baby." He got the baby and laid the baby on the couch. Cliff had taken the complainant to the children's bedroom where the door was locked and when he put his weight against it, the complainant hollered, "Paul, don't come in here because he will kill me." Defendant took the children to her bedroom and was "fixing to leave out to go call the police," but didn't want to leave the children alone. As he came out of her bedroom, he heard the front door slam. She was sitting on the edge of the bed and when he asked if she was all right, she jumped up and started hollering and cussing, ran and got a pistol and told him she was going to kill him because he "had put this young man by the name of Clifford up to do this to her." After two or three minutes, she said, "No, shooting won't be good enough. I'm going to call the police and tell them that you raped me." He told her he was going to the tavern and left, and about 20 or 25 minutes later he was arrested. He testified he did not threaten her life, did not have a weapon in his possession and did not choke the baby. He denied he had intercourse with Mrs. Carpenter that day. The first time he told anybody he was hit with the gun was in court, which was the first time he had had an opportunity. He did not get medical treatment except for an aspirin at the County Jail.

Chicago Police Officer David Oglesby was recalled and testified for the State in rebuttal that the day he arrested the defendant, the defendant said the victim was his "girlfriend," that he "used to go with her" and that he "had had relationship with" the victim. In street talk, he said he had sex with her,

defendant's actual statement was: "I went with her, you know."

In a rape case, where the testimony of the complaining witness is not clear and convincing, it must be corroborated. The complainant's testimony here was not only clear and convincing, it was also corroborated. The victim testified she had seen the defendant before, but was very specific as to those occasions and positive that she had not at any time invited the defendant into her home or had intercourse with him. Defendant argues it is improbable that one of the five children would not have left the apartment to summon help, yet the oldest child was only six years of age and there was testimony that the defendant had told the children to stay "in the back," and if they did, then their mother would not be hurt. The incident was both loud and violent and the children were personally threatened by the intruders. Booker's testimony that he saw the defendant enter the victim's apartment on one occasion with her consent at best raised a question of credibility since the victim was positive in her testimony that she had never allowed the defendant into her apartment. Complainant's testimony shows that two men forcibly entered her apartment, the defendant helped his partner get her panties off while his companion had intercourse with the victim. The defendant threatened her and her children and kept the children at bay; growing impatient, defendant forced the other man off of the victim and took her into a bedroom where another child was sleeping and himself raped her while the other man watched from the doorway.

The victim's testimony was corroborated in several respects. First, there was the medical evidence to be considered. Defendant argues that the presence of sperm in a married woman is not corroboration of rape, and points to the lack of motility of the sperm as evidence in his favor. However, the stipulation states that lack of motility could be explained in a number of ways, by

abnormalities in the male, various conditions of the female, or by the passage of time since intercourse. It is true that the presence of sperm indicates only a recent act of intercourse and not rape; and if this were the only evidence tending to support complainant's testimony, it would not be sufficient corroboration of rape. (People v. Reese (1973), 14 Ill. App. 3d 1049, 1054-1055, 303 N.E. 2d 814.) Irrespective of complainant's marital status, the presence of sperm was a circumstance that could be considered in corroboration of the complainant's testimony. The precise weight that ought to be accorded to such evidence is more properly a question for the trier of fact. People v. Nemke (1970), 46 Ill. 2d 49, 58, 263 N.E. 2d 97.

The complainant's testimony was also corroborated by her prompt reporting of the incident to the police after she first attempted to get in touch with her husband. The investigating police officer's testimony also corroborates the complainant's testimony, since he observed the burglary chain on the door had been broken. The testimony of the upstairs neighbor, who heard the victim screaming, "Please let me alone," and continuing screaming for 45 minutes was additional "corroboration." In addition, within two or three days after the rape, she told the defendant's mother and father, the one over the phone and the other in person, when they confronted her, that the defendant had indeed raped her. The sufficiency of the evidence and the weight to be given the testimony of witnesses are questions which are best determined by the trial judge in a non-jury case and his determination will be disturbed on review only where the proof is so unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. The defendant's guilt here was proven beyond a reasonable doubt. People v. Sims (1972), 5 Ill. App. 3d 727, 730, 283 N.E. 2d 906.

Finally, defendant contends that the mandatory four-year sentence for rape violates article I, section 11 of the 1970 Constitution of Illinois which provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Although non-jurisdictional questions relating to the constitutionality of the statute are waived unless asserted in the trial court (People v. Eubank (1970), 46 Ill. 2d 383, 393-394, 263 N.E. 2d 869), the precise contention made by the defendant has been rejected explicitly in two recent cases, both upholding the constitutionality of the 14-year minimum sentence for murder. (People v. Cantrell (1973), 14 Ill. App. 3d 1068, 304 N.E. 2d 13, and People v. Hall, No. 58298, November Term, 1973.) Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Burke, J., did not participate.



58302

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE PHILIP ROMITI,
WILLIE O. CURSE,	)	Presiding.
)	
Defendant-Appellant.))	

PER CURIAM:*

Willie O. Curse (defendant) was found guilty at a bench trial of the offense of voluntary manslaughter, in violation of Section 9-2(a) of the Criminal Code, and was sentenced to a term of three years to ten years. (Ill. Rev. Stat. 1971, ch. 38, par. 9-2(a).) He contends on appeal that the State failed to prove his guilt beyond a reasonable doubt.

Mrs. Delores Parker testified for the State that she was employed as a bar maid at a lounge on South Mackinaw Avenue in Chicago and that she was working the 5:00 P.M. to 2:00 A.M. shift on January 2-3, 1972. The witness had known defendant and the deceased, Henry Lee Curse, for about ten years and both men were in the lounge on that night prior to the 2:00 A.M. closing time. The witness testified that to her knowledge defendant had not been employed by the lounge, although she did see him sweep the lounge in the past, and that at about 1:45 A.M. defendant told her to "get on her job," whereupon she turned down the volume on the jukebox which was playing and went to the front of the lounge to turn off the light. The deceased turned the volume of the jukebox back up and a series of maneuverings took place between the witness and the deceased whereby they "went to turning it up and down." The witness testified that she finally unplugged the jukebox from the nearby wall socket, that the deceased plugged it back into the socket and that the witness returned to her station behind the

bar. She testified that defendant and the deceased then got into an argument, that defendant unplugged the jukebox and that the deceased again plugged it in. Mrs. Parker thereafter observed patrons running from the lounge, she observed the deceased and defendant engaged in a physical struggle near the jukebox, she observed a gun being waved during the struggle but was unable to determine who held the weapon, and she heard a shot and saw the deceased fall to the floor. The witness testified that after the shooting she observed the gun in defendant's hand. The police were called, defendant locked the front iron gate to the establishment and refused to turn the gun over to the police when they arrived; the witness took the weapon from him and gave it to the officers. Mrs. Parker testified that she did not serve alcoholic beverages to the deceased that night and that the deceased had entered the lounge about a half hour prior to the shooting.

Irving Arbuckle testified for the State that he was in the lounge with the deceased and another person from about 9:00 or 9:30 P.M. on January 2nd, that the deceased had been served two glasses of wine during that period, that defendant had been employed by the lounge as a night watchman, and that defendant entered the lounge about 1:45 A.M. on January 3rd. Mr. Arbuckle testified that, when defendant entered the lounge, he told Mrs. Parker to "get on her job" and that Mrs. Parker turned down the volume on the jukebox. The deceased then turned the volume up again, Mrs. Parker did nothing, and defendant unplugged the machine. The deceased plugged the machine back into the socket, defendant again unplugged it and the deceased shoved defendant back several feet and plugged in the machine. Defendant again tried to unplug the machine, the deceased again shoved him and defendant drew a gun from his pocket. Mr. Arbuckle testified that, after defendant drew the weapon, he attempted to pull the plug to the jukebox again, that the deceased then shoved defendant back and that the gun discharged. The witness did not see anything in the deceased's hands during the

confrontation and did not see the deceased reach for the gun drawn by defendant. The witness heard no conversation between defendant and the deceased prior to the shooting and testified that the two men were about two feet apart when the gun went off.

The arresting police officers testified for the State, related the facts surrounding defendant's arrest and also testified to defendant's statement to the officers that, "I shot the man, this is my job and I'm not giving you this gun." The gun and the keys to the lounge were wrested from defendant's possession.

Defendant offered no evidence in his own behalf. It was stipulated between the State and defendant that the deceased died of a bullet wound to the chest, that post-mortem analyses demonstrated 350 milligrams of "ethenyal" in the deceased's blood and 376 milligrams of alcohol in his urine, and that defendant was 48 years of age. The evidence also disclosed that defendant and the deceased were second cousins and that the deceased was 20 years of age.

A person commits the offense of voluntary manslaughter when he kills another without lawful justification while acting under a sudden and intense passion resulting from serious provocation by, inter alia, the individual killed; "serious provocation" is defined by the Criminal Code as conduct sufficient to excite an intense passion in a reasonable person. Ill. Rev. Stat. 1971, ch. 38, par. 9-2(a).

The trier of fact heard evidence that the deceased had been drinking, that the deceased and Mrs. Parker engaged in a controversy over the playing of the jukebox, that the controversy shifted to defendant and the deceased, that the deceased and defendant struggled physically over the matter and the latter was shoved by the former several times, and that the deceased was shot in the course of the argument. The State introduced sufficient evidence from which the trier of fact could have found that defendant shot the deceased under a sudden and intense passion after having struggled with, and been

shoved by, the deceased. People v. Pierce, 52 Ill.2d 7, 284 N.E.2d 279.

The discrepancies and conflicts in the testimony of the State's witnesses, relied upon by defendant on appeal as having raised a reasonable doubt as to his guilt, were minor in nature and were for resolution by the trier of fact. The determination of the trier of fact is not palpably erroneous and will therefore not be disturbed on review. People v. Fleming, 50 Ill.2d 141, 277 N.E.2d 872.

The argument is also raised that witness Arbuckle's testimony was discredited as to whether defendant possessed the gun at the outset of the struggle with the deceased, thereby giving rise to the conclusion that the deceased possessed the gun initially and defendant acted in self-defense. The credibility of Arbuckle's testimony was for the trier of fact and defendant's contention in this regard is therefore without merit.

The cases cited by defendant in support of his position on this appeal are clearly distinguishable on their facts from the case at bar. See People v. Barfield, 113 Ill.App. 2d 390, 251 N.E.2d 923; People v. Lewellen, 43 Ill.2d 74, 250 N.E.2d 651.

For these reasons the judgment of the Circuit Court of Cook County is affirmed.

A F F I R M E D.

*FIRST DISTRICT - SECOND DIVISION.
LEIGHTON, J., did not participate.



58346

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT COURT
) OF COOK COUNTY.
vs.)
)
REGINAL BROWN (otherwise called) HONORABLE JAMES M. BAILEY,
REGINALD BROWN), Impleaded,) Presiding.
)
Defendant-Appellant.)

PER CURIAM:*

Reginal Brown, defendant, Ralph Brown, and Charles Hicks were charged by indictment with the crime of armed robbery in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). After a bench trial, all three were found guilty of robbery. Defendant was sentenced to a term of three to nine years. On appeal, he contends that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, the following evidence was adduced: Martin Irwin, the complaining witness, testified that on December 12, 1971, at approximately midnight, he boarded a C.T.A. bus going west at 47th and Ashland. He noticed Ralph Brown and Reginal Brown seated at the front of the bus, and Charles Hicks and Curtis Brown (a juvenile) seated in the rear of the bus. Irwin sat down in the middle of the bus. Ralph Brown came from the front of the bus and sat next to Irwin while defendant Reginal Brown sat in the seat in front of Irwin. Hicks came from the rear of the bus and sat in the seat behind Irwin and Curtis Brown sat in the seat in front of Irwin. Ralph Brown asked Irwin if he had any money and Irwin replied that he did not. While Hicks held Irwin by his coat, Ralph Brown demanded Irwin's wallet. Ralph Brown then pulled out a nail file with which he poked Irwin in the leg. Ralph Brown put the nail file next to Irwin's throat and said, "You better let me search you." Ralph Brown then took \$11 from Irwin's wallet. During the incident,

Reginal Brown sat in the seat in front of Irwin facing him. Curtis Brown spotted a radio in Irwin's pocket and demanded it. When Irwin refused, Curtis Brown hit Irwin in the mouth and took the radio. All four men got off the bus at 47th and Kedzie. Shortly thereafter, Irwin got off the bus and called the police. The police took Irwin to the area at 47th and Kedzie where he identified the four men who had robbed him.

John Kosiewicz, a Chicago Police Officer, testified that on December 12, 1971, in the early morning hours, he responded to a call and proceeded to Archer and 47th Street where he interviewed Martin Irwin. He took Irwin to the area of 47th and Kedzie where Irwin identified Ralph Brown, Reginal Brown, Curtis Brown and Charles Hicks as the men who had robbed him. Officer Kosiewicz placed the four men under arrest. A nail file was recovered from the person of Ralph Brown and a portable radio, identified by Irwin as taken in the robbery, was discovered on the person of Curtis Brown.

Reginal Brown testified that on December 12, 1971, he was on a C.T.A. bus with his cousin, Charles Hicks, his brother, Ralph Brown, and Curtis Brown. He observed the complaining witness, Irwin, get on the bus and sit in the seat directly behind him. Ralph Brown went over and sat next to Irwin. He testified that Curtis Brown and Charles Hicks did not at any time sit next to or near Irwin. He denied that he at any time asked Irwin for money or took part in any robbery.

Ralph Brown testified that on December 12, 1971, he was on a C.T.A. bus with Curtis Brown, Reginal Brown, and Charles Hicks. He observed the complaining witness, Irwin, get on the bus. He went over and sat next to Irwin and asked for money. He denied that he at any time took out his nail file while asking for money. He testified that Irwin gave him his wallet and he took \$11 from the wallet.

Defendant's only argument on appeal is that he was not proved guilty beyond a reasonable doubt because the evidence was insufficient to establish that he was accountable for the actions of his co-defendants. Section 5-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 5-2) provides that a person is legally accountable for the conduct of another when:

"(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

Where defendants have a common design to do an unlawful act, the act of any one of them done in furtherance of the common design is the act of all. People v. Jones, 12 Ill.App.3d 643, 299 N.E.2d 77. Proof of a common design need not be supported by words of agreement; the proof can be drawn from the circumstances surrounding the commission of the act. People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478. While mere presence at the scene of a crime is insufficient to establish accountability (People v. Rudolph, 12 Ill.App.3d 420, 299 N.E.2d 129), proof that a person was present at the commission of a crime without disapproving or opposing the crime may be considered with other circumstances. People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367.

In People v. Ramos, ____ Ill.App.3d ____, ____ N.E.2d ____ (No. 58215, filed September 25, 1973), Ramos, Colon, Munoz, and Davilla were convicted of theft. The evidence adduced at trial demonstrated that all four defendants approached the complaining witness together. While Munoz stopped the complainant and engaged him in conversation, Colon produced a gun and pushed the complainant over to the side, where Ramos took his money. During the incident, Munoz and Davilla stood approximately one foot away from the complainant on each side. On appeal, Munoz and Davilla argued that the evidence was insufficient to establish that they were accountable for the actions of their co-defendants. This court rejected that contention, holding that the

evidence was sufficient to establish that the defendants aided and abetted and were accountable for the conduct of their co-defendants.

In the case at bar, two offenders were seated in the front of the bus and two offenders were seated in the rear of the bus at the time Irwin got on. Irwin sat down in the middle of the bus. Ralph Brown came from the front of the bus and sat next to Irwin, while Reginal Brown and Curtis Brown sat in the seat in front of Irwin, and Hicks sat in the seat behind Irwin. While Hicks held Irwin by the coat, Ralph Brown demanded money and produced a nail file with which he poked Irwin in the leg. Ralph Brown then put the file up to Irwin's throat and took \$11 from Irwin's wallet. During the entire incident, defendant, Reginal Brown, sat in the seat in front of Irwin and looked on. Reginal Brown did not at any time disapprove or oppose the actions of his co-defendants. After the robbery was completed, all four men left the bus together. A short time later, all four men were arrested together in the area where they had gotten off the bus. From the totality of these circumstances, the trial judge could have reasonably found that Reginal Brown was more than just an innocent bystander and that he had lent his approval to the robbery by aiding and abetting in its commission. The evidence was sufficient to establish Reginal Brown's guilt beyond a reasonable doubt.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

A F F I R M E D.

*First District-Second Division
Downing, J., did not participate.

58390

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
vs.)
)
CLAUDE BANKS,) HONORABLE PHILIP ROMITI,
) Presiding.
)
Defendant-Appellant.)

PER CURIAM:*

Claude Banks, defendant, was found guilty, after a bench trial, of the offense of armed robbery in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). He was sentenced to a term of five to ten years. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, the following evidence was adduced: James Vose testified that on August 14, 1971, he was employed as a bartender at the Lemon Tree Lounge, 2813 E. 77th Street, Chicago, Illinois. At approximately 1:20 A.M., defendant and a second man entered the tavern by the side door. Vose informed the men that the bar was closed and defendant asked if he could get a carry-out order. Vose proceeded to the front carry-out area of the bar along with defendant. The carry-out area of the bar is lit by two neon signs on the wall, one overhead neon sign and a bright light on the pop machine that shines directly onto the counter. As defendant stood in front of the counter approximately three to four feet from Vose, the second man produced a revolver and announced a holdup. Defendant ordered Vose to come to the front of the counter. Vose complied and defendant took \$11 from his person. The second man holding the gun at the doorway ordered Vose to lie on the floor. Defendant then took approximately \$100 from the cash register. The entire robbery took approximately five minutes. Vose testified that during the robbery

he was able to see the defendant's face clearly for approximately two minutes. On September 20, 1971, Vose identified the defendant from among six photographs. The same day, Vose identified the defendant in a five-man lineup.

Robert R. Freitag, a Chicago Police Officer, testified that on September 20, 1971, he took a photograph of defendant, together with five other photographs, and showed them to James Vose, who identified defendant's photograph. Later the same day, Vose was taken to the Fourth District Police Station, where he identified defendant out of a five-man lineup.

Claude Banks, defendant, testified that he is in the United States Army. On August 13, 1971, he was on furlough and spent the evening at Debra Curry's house. Present were Debra Curry, her husband, Yolanda Curry, and Debra Curry's husband's brother. He arrived at about 11:00 A.M. and went shopping with Yolanda Curry, returning at 6:30 P.M. He did not leave the Curry home again until 2:30 A.M. on August 14th when he, Yolanda Curry and Debra Curry drove Peyton and Sharon Jenkins home. He returned back to the Curry residence at 4:15 A.M.

Yolanda Curry and Debra Curry testified that on August 13, 1971, defendant spent the evening at the Curry home until 2:30 A.M. when they accompanied him to drive Sharon and Peyton Jenkins home. They returned back at the Curry home at approximately 3:30 or 4:00 A.M.

Charles Keller testified in rebuttal that at 11:45 P.M. on August 13, 1971, he observed two men enter a vehicle parked at 7711 S. Burnham, Chicago, Illinois. At approximately 1:30 A.M., he observed the same automobile on 77th Street directly in front of the Lemon Tree Lounge. He followed the car and got the license number, PK 3621.

It was stipulated that 1971 Illinois license plates PK 3621 were issued to the defendant, Claude Banks, Jr., on a 1964 Ford

four-door hardtop.

Defendant argues that he was not proven guilty beyond a reasonable doubt because the identification testimony was doubtful, vague and uncertain. Defendant bases this argument upon the fact that the complainant did not identify him for more than a month after the robbery, that the complainant did not, when he gave the police a description of the robber, mention that the robber was wearing a goatee, and that the carry-out area was dimly lit.

In a bench trial, credibility of witnesses is for the trial judge to determine. The decision of the trier of fact as to credibility of witnesses will not be disturbed unless it is based upon evidence which is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt. People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378; People v. Daugherty, 1 Ill.App.3d 290, 274 N.E.2d 109. The testimony of one witness, if positive and credible, is sufficient to sustain a conviction, even though contradicted by the accused. People v. Bonds, 132 Ill.App.2d 827, 270 N.E.2d 575.

The amount of time intervening between the incident and the identification is a factor to be considered, but identifications have been upheld where more than one month has elapsed. People v. Bennett, 9 Ill.App.3d 1021, 293 N.E.2d 687. Similarly, the failure of an identifying witness to notice or describe facial hair or a scar goes only to the weight to be attached to the identification testimony. People v. Robinson, 3 Ill.App.3d 843, 279 N.E.2d 526. Precise accuracy in describing a defendant's facial characteristics is unnecessary where the identification is positive. People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694.

In the case at bar, Vose testified that he was able to observe the defendant during the robbery for approximately two minutes from close proximity in the carry-out area of the bar. He described the carry-out area of the bar as being lighted by three neon signs and a bright light on a pop machine. It was for the trier

of fact to make the initial determination as to whether or not the complaining witness had a sufficient period of time under adequate lighting so as to fix the identity of the defendant. Here the trial judge determined that Vose had sufficient time under adequate lighting so as to identify the defendant. After a complete review of the entire record, we cannot say that the trial judge's determination was erroneous.

Defendant also argues that his alibi testimony should not have been disregarded by the trial court and was sufficient to create a reasonable doubt as to his guilt. The trial judge is not obliged to believe the alibi testimony of the defendant over the positive identification of the accused, even though the alibi may be established by a greater number of witnesses. People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462; People v. Gaiter, 8 Ill. App.3d 784, 291 N.E.2d 174. Here the trial judge, who observed the demeanor of the witnesses during trial, found that the defendant was the perpetrator of the crime and, where, as here, that finding was based upon sufficient evidence, this court will not reverse that finding.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

A F F I R M E D.

*First District-Second Division
LEIGHTON, J., did not participate.

ABSTRACT OPINION ONLY



58398

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
TERRY SCOTT,	)	THOMAS P. CAWLEY,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM:

The defendant, Terry Scott, was found guilty after a bench trial of two charges of theft and sentenced to six months in the House of Correction on each of the charges, said sentences to run concurrently.

The defendant, together with his co-defendants, Tyrone Walker and Marian McCormick, was charged with the theft of a Zenith portable television set on August 10, 1972, from 3801 North Pine Grove Avenue, Chicago, and also the theft of a tool box on August 14, 1972, from 5100 North Sheridan Road, Chicago, in violation of section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1). The property was found in the apartment of Marian McCormick, Apartment 1307, 4101 South Federal Street, Chicago. Tyrone Walker was found guilty of both charges of theft and sentenced to six months in the House of Correction on each of the charges, said sentences to run concurrently. Marian McCormick was found not guilty.

On appeal, the defendant contends that the trial court committed error when it refused to allow the defendant to cross-examine Marian McCormick, one of his co-defendants; that the defendant did not understandingly waive his right to a jury trial; that the trial court erred in denying the defendant's motion for a continuance to seek private counsel;

and that the State failed to prove the defendant guilty beyond a reasonable doubt.

We are of the opinion that the trial court erred when it refused to allow the defendant to cross-examine Marian McCormick, one of his co-defendants, and, therefore, it is not necessary to give a detailed analysis of the evidence. A brief statement of the facts will suffice.

At the trial a witness testified that she saw two men take a television set from the premises at 3801 North Pine Grove Avenue, Chicago, and place it in the trunk of a white and light green Cadillac; and that she took the license number of the automobile and gave it to the police. Another witness testified that she saw two boys take some personal property from an apartment at 5100 North Sheridan Road, Chicago, including a tool box, and saw them place the items in the trunk of an automobile. She wrote down the license number of the automobile and gave it to the police. Both witnesses identified the defendant and co-defendant Tyrone Walker as the men whom they saw carrying the items of personal property and putting them in the trunk of the car.

By means of the license numbers, the police traced the car to Marian McCormick. Police Officer McNelley went to the apartment of Marian McCormick, 4101 South Federal, Chicago. The defendant admitted McNelley and permitted him to examine the apartment. McNelley found both the portable television set and the tool box in the apartment. While in the apartment, McNelley also noticed a telephone bill showing that the telephone in the apartment was listed under Tyrone Walker's name.

Miss McCormick testified that she had received a Zenith television set from the defendant three days prior to the arrest. She further testified that the defendant drove her automobile during the day and picked her up after work in the evening. She said that the defendant lived with her for about two weeks prior to their arrest and that Walker did not live there.

On cross-examination by the Assistant State's Attorney, Miss McCormick testified that nobody besides the defendant and she lived in the apartment during the month of August; and that nobody else had access to the apartment. She testified that the Zenith television set was in her bedroom for about three days before she was arrested; and that she had exchanged it with defendant for one she owned. Miss McCormick further testified that Tyrone Walker lived at 6215 South Wabash Avenue, Chicago.

After the cross-examination of Miss McCormick by the Assistant State's Attorney, the following proceedings took place:

"MR. MIKULA [Assistant Public Defender, counsel for Terry Scott]: I would like to ask a few questions of the witness. She did say some rather damaging things about Mr. Scott.

THE COURT: What is the State's position on that? I don't think you have a right to cross-examine a co-defendant. What is the State's position?

You can object to any statement of a co-defendant as it applies to your client, but I don't believe that you can make any -- conduct any cross-examination of any witness other than a State witness.

MR. BEST [Assistant State's Attorney]: Your Honor, I'd have no objection to him asking questions.

THE COURT: Well, if the State doesn't object and you still request -- both parties being in agreement, I'll allow you to do it.

MR. BEST: I would reserve the right to question her after he finishes with her on recross.

MR. MIKULA: Certainly. We have no objection to this.

CROSS EXAMINATION
By Mr. Mikula:

Q You say you work for the Department of Public Aid?

A Yes.

Q What hours do you work?

A 8:30 to 4:30.

Q What do you do for them?

A Case aid --

THE COURT: I'm going to sustain my original position and not allow any examination of another defense witness. I don't think it's proper.

MR. MIKULA: This so far is the most damaging thing that has come out against Mr. Scott.

THE COURT: I'm going to restrict any examination by a codefendant of this witness. You still have the opportunity to have your witness testify if you wish. I'm just restricting cross of the codefendant. All right. Who wants to proceed next?"

From the testimony of Marian McCormick, it is apparent that she was attempting to relieve herself and Tyrone Walker, the other co-defendant, of all responsibility for the thefts and to place the blame upon the defendant. Under such circumstances, it was error for the trial court to deny the defendant the right to cross-examine Miss McCormick, especially when the State had no objection.

A person accused of a criminal offense has a constitutional right to be confronted by the witnesses against him and that right includes the right to cross-examine such witnesses. People v. Smith, 38 Ill. 2d 13, 230 N.E.2d 188.

In People v. Allison, 325 Ill. 578, 586, 156 N.E. 798, the court held that, where two defendants each tried to show the other was guilty, each should have the right to cross-examine the other and attempt to bring out facts which might weaken or destroy the effect of the other's testimony. Likewise, in the case at bar, co-defendant Marian McCormick tried to show that the defendant was guilty and that she and co-defendant Walker were free of any wrongdoing. Under such circumstances, the defendant should have the right to cross-examine Miss McCormick.

In People v. Braune, 363 Ill. 551, 2 N.E.2d 839, the court held (363 Ill., p. 555):

"Ordinarily the right of one defendant to cross-examine his co-defendant does not exist. However, there is an exception to the rule, based on justice and necessity. Where one defendant has given testimony which tends to incriminate the other defendant, the latter, especially where he had no prior notice of such incriminating testimony, may cross-examine the former; * * *."

Also see 4 Ill. Crim. Proc., sec. 31.62, and 36 I.L.R. (1941-1942), pp. 419-420.

In the case at bar, it is apparent that the co-defendant, Marian McCormick, was attempting to place the entire blame for the theft of the Zenith television set and the tool box on the defendant. Furthermore, there is nothing in the record to indicate there was any notice or warning that McCormick was antagonistic to Scott until she testified. Therefore, it was reversible error for the trial court to deny the defendant the right to cross-examine Miss McCormick.

In light of the foregoing, it is not necessary to discuss the other issues raised by the defendant.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

Second Division

Leighton, J., did not participate.



58458

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
)	
ROBERT CARR,	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:*

Defendant, Robert Carr, was found guilty after a bench trial of the offense of theft as a misdemeanor, in violation of section 16-1(a)(1) of the Criminal Code, and was sentenced to a term of one year at the Illinois State Farm at Vandalia. Ill. Rev. Stat., 1971, ch. 38, par. 16-1(a)(1). He appealed.

The public defender of Cook County has filed in this Court a motion for leave to withdraw as appellate counsel, supported by a brief pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, on the ground that the sole question which could be raised on appeal, that of whether defendant was proved guilty beyond a reasonable doubt, is without merit and the appeal frivolous. Copies of the motion and brief were forwarded to defendant on October 19, 1973, and this Court allowed him time until December 24, 1973, to file any points he desired in support of the appeal; defendant had not responded as of January 9, 1974.

Laurie Kellogg, the complainant, testified for the State that at 5:45 A.M. on July 15, 1972, she was awakened by shouts in her apartment on West Webster Avenue in Chicago; that she determined that several items of personal property were missing from the apartment; and that she immediately notified police. One of the items missing from the apartment was a check drawn by the witness payable to the order of Sears, Roebuck, in the

amount of \$6.78, which had been in a pocket of a jacket hanging on the doorknob to the witness' bedroom. The check, which the witness identified at trial, was next seen by the witness about fifteen minutes after the police had been notified and had arrived at the apartment. The other items of property missing from the apartment did not belong to the complaining witness.

Police Officer Malone testified for the State that he responded to a call from the apartment at the West Webster Avenue address at about 5:45 A.M. on July 15, 1972, where he received a "description" during a conversation with occupants of that apartment. The officer then observed defendant about three blocks from the apartment; observed defendant place one of the other stolen items on the ground; and thereupon arrested and searched defendant. Defendant was returned to the apartment, where a more thorough search of his person revealed the check belonging to Miss Kellogg.

This Court is in agreement with appellate counsel's position that an issue raised on appeal as to the question of reasonable doubt would be without merit. Defendant was apprehended by the arresting officer in open possession of one of the other items reported to have been taken from the apartment; a search of his person disclosed that he was also in possession of a check stolen from the apartment and belonging to Miss Kellogg; and defendant was apprehended a short distance from where, and a short time after, the incident occurred. Defendant's recent, exclusive and unexplained possession of the stolen property raises an inference that he committed the offense charged. People v. Christeson, 122 Ill. App. 2d 192, 258 N.E. 2d 142. The fact that the check in question had been made payable to someone other than Miss Kellogg does not, as defense counsel contended at trial, alter the fact of ownership

of the check in Miss Kellogg: she had drawn the check, she still had it in her possession at the time of the theft, and she could have disposed of it as she wished prior to delivery to the payee. See e.g., Investors Commercial Corp. v. Metcalf, 13 Ill. App. 2d 99, 103-104, 140 N.E. 2d 924. The credibility of the witnesses was for the trier of fact, and we cannot say that that determination was erroneous.

Upon independent review of the instant record as required by the Anders decision, we have noted a single matter which may serve as a ground for appeal in this case, but which does not merit a fully developed appeal and which may be summarily disposed of at this time.

Defendant was found guilty of the offense of theft of property having a value not exceeding \$150 and was sentenced to a term of one year at the Illinois State Farm at Vandalia. The Statute under which he was found guilty and sentenced provided that such offense shall be punishable by, inter alia, a term of incarceration "not to exceed one year." Ill. Rev. Stat., 1971, ch. 38, par. 16-1. The Unified Code of Corrections, which is applicable to the instant case since it has not yet reached "final adjudication" (People v. Harvey, 53 Ill. 2d 585, 294 N.E. 2d 269), provides that theft of property having a value not exceeding \$150 and not from the person is a Class A misdemeanor, for which the penalty is "less than one year." Ill. Rev. Stat., 1972 Supp., ch. 38, pars. 16-1(e)(1) and 1005-8-3(a)(1). Defendant is therefore entitled to a reduction of the sentence imposed upon him by one day. See People v. Johnson, ___ Ill. App. 3d ___, ___ N.E. 2d ___ (#57714, 1st Dist., November 2, 1973). The sentence is so modified.

No other matter has been found upon our independent review of the instant record which could support an appeal in this case.

58458

For these reasons, the motion of the public defender for leave to withdraw as appellate counsel is allowed; the sentence imposed upon defendant's judgment of conviction is modified by the reduction of one day, and the judgment of conviction, as modified, is affirmed.

MOTION ALLOWED.
JUDGMENT AFFIRMED, AS MODIFIED.

*SECOND DIVISION, FIRST DISTRICT.
DOWNING, J., did not participate.

NOS. 58543)
58544) Consolidated



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
JERRY HAIRSTON, also known as	)	HONORABLE
JAMES HESTER,	)	PHILIP ROMITI,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM:

Two records have been filed with the Clerk of this court. In Appellate Court No. 58543 the defendant, Jerry Hairston, was charged with the offense of armed robbery in that on October 11, 1971, he took an unknown amount of United States currency and other personal property from George Noth, Jr. and Stanley Tryba, Jr. in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). In Appellate Court No. 58544 James Hester, otherwise called Jerry Hairston, was charged with the offense of armed robbery in that on January 1, 1972, he took an amount of United States currency from Daisy L. Alexander and Frank Amos in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 18-2). He was also charged with the offense of attempt to commit the offense of murder on January 1, 1972, by shooting at Julian Daggett in violation of Section 8-4 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 8-4). The defendant was found not guilty of armed robbery of Daisy L. Alexander. As to all the other charges, the defendant changed his pleas of not guilty to pleas of guilty. After a hearing in aggravation and mitigation, defendant was sentenced to a term of not less than five years nor more than eight years on each of the remaining charges of armed robbery and the charge of attempt murder, all sentences to run concurrently. On October 27, 1972, the defendant filed notices of appeal.

The Public Defender has filed a motion for leave to withdraw, supported by a brief pursuant to Anders v. California, 386 U.S. 738, in which he alleged that the only grounds for appeal are whether the trial judge fully admonished the defendant as to the significance and consequences of his change of pleas from not guilty to guilty, and whether the sentences comply with the provisions of the Unified Code of Corrections.

The defendant was served with copies of the motion and brief, and was given time within which to file any points he might choose in support of the appeal. The defendant has filed no response.

On October 12, 1972, counsel for the defendant informed the trial judge that the defendant wished to withdraw his pleas of not guilty and enter pleas of guilty as to each of the remaining charges of armed robbery and attempt murder (i.e., as to the charges other than the charge of armed robbery of Daisy Alexander). Prior to accepting the defendant's pleas of guilty as to the remaining charges filed against him, the trial judge gave the defendant the admonishments required by Illinois Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch.110A, par. 402). In response to interrogation by the trial judge, the defendant stated that he understood that he was charged with the offenses of armed robbery and attempt murder; that on the charges of armed robbery the statute provided for a penalty of incarceration for a period of not less than five years and an indeterminate number of years beyond that of 100, 200 or any number of years in between; that on the charge of attempt murder the penalty was not less than one nor more than twenty years or any figure in between those two; that, upon the waiver of a jury trial and the pleas of guilty, there would be no trial of any kind and that he thereby waived his right to confront the witnesses against him; that by pleading

guilty he waived his right to continue with the trial; that there had been a conference among his attorney, the state's attorney, and the trial judge; that he had been informed of the result of that conference by his attorney and by the trial judge; and that the state's attorney had recommended sentences of five to fifteen years but that the trial judge was of the opinion that sentences of five to eight years would be fair. The defendant further stated that he understood that by his pleas of guilty he admitted the facts and circumstances testified to by the State's witnesses as to the case then on trial; that he admitted the facts stipulated to by his counsel and recited by the state's attorney; and that there had been no pressure, force or coercion of any kind causing him to change his pleas from not guilty to pleas of guilty.

The admonishments by the trial judge were more than sufficient to comply with Supreme Court Rule 402. Peoole v. Evans, 45 Ill. 2d 265, 259 N.E. 2d 41; People v. Eads, 2 Ill. App. 3d 411, 413, 272 N.E. 2d 293. The purpose of Rule 402 is to safeguard the rights of an accused person, and to insure that a guilty plea is intelligently, understandingly, and voluntarily made. People v. Reeves, 50 Ill. 2d 28, 276 N.E. 2d 318. Rule 402 requires substantial compliance with its precepts, and the test is whether the record affirmatively discloses that the defendant who pleads guilty enters his plea intelligently, understandingly, and voluntarily. People v. Campbell, 13 Ill. App. 3d 237, 239, 300 N.E. 2d 568.

It is apparent from an examination of the proceedings relative to the pleas of guilty that the trial judge was thorough and careful in accepting the pleas of guilty. The pleas of guilty were entered intelligently, understandingly, and voluntarily. The opinion of the Public Defender that the argument raised does not have substantial merit is sustained by the record.

The Public Defender states that the sentences were not excessive. Defendant was sentenced to five to eight years on the armed robbery charges as well as on the attempt murder charge, said sentences to run concurrently. Section 5-8-1 of the Unified Code of Corrections (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 1005-8-1) provides in part as follows:

"[2] for a Class 1 felony, the minimum term shall be 4 years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term;"

Section 8-4 of the Criminal Code (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 8-4) provides that "the sentence for attempt to commit murder shall not exceed the sentence for a Class 1 felony;" and Section 18-2 (Ill. Rev. Stat., 1972 Supp., ch. 38, par. 18-2) provides that "Armed robbery is a Class 1 felony for which an offender may not be sentenced to death."

In People v. Harvey, 53 Ill. 2d 585, 294 N.E. 2d 269, it was held that the sentencing provisions of the Unified Code of Corrections apply to cases pending on direct appeal. Therefore, the provisions of the Unified Code of Corrections apply to the case at bar. The statute sets out a minimum in the case of armed robbery and attempt murder (Class 1 felonies) of four years. However, the trial judge is granted discretion to set a higher minimum term by considering "the nature and circumstances of the offense and the history and character of the defendant."

In the case at bar, at the suggestion of counsel for defendant, the trial judge sentenced the defendant to a five year minimum sentence on each of the armed robbery convictions as well as on the attempt murder conviction, said sentences to run concurrently. On the hearing in aggravation and mitigation it was disclosed that the defendant had four previous convictions and had previously received sentences totaling

eighteen months. The trial judge had an opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed. (People v. Taylor, 33 Ill. 2d 417, 424, 211 N.E. 2d 673, 677; People v. Adams, 113 Ill. App. 2d 205, 220, 252 N.E. 2d 35, 43.) In view of the record, the trial judge, in sentencing the defendant to a minimum of five years and a maximum of eight years on each of the armed robbery convictions as well as on the attempt murder conviction, said sentences to run concurrently, was acting with the discretion conferred by the statute. The sentences do not contravene the provisions of the Unified Code of Corrections. People v. Rudolph, 12 Ill. App. 3d 420, 299 N.E. 2d 129.

Our inspection of the record does not disclose any additional possible grounds for appeal. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel for the defendant on appeal, and the judgments of the circuit court of Cook County are affirmed.

MOTION ALLOWED;
JUDGMENTS AFFIRMED.

Second Division; Judge Stamos not participating.

Publish abstract only.



58115

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,)	
	)	CIRCUIT COURT OF
v.)	
	)	COOK COUNTY.
WILBERT PALMER, a/k/a WILBERT T.)	
PALMER,	)	Hon. Richard J. Fitzgerald
	)	Presiding.
Defendant-Appellant.)	

MR. PRESIDING JUSTICE ADESKO delivered the opinion of the court:

Wilbert Palmer, the defendant, was found guilty after a bench trial of the offenses of armed robbery and rape. He was sentenced to concurrent terms of from six to twelve years in the penitentiary. After being advised of his right to appeal, defendant expressed a wish to have his case reviewed in this court. Accordingly, the Public Defender of Cook County was appointed to represent him in this appeal.

The Public Defender has now filed a motion for leave to withdraw as defendant's appellate counsel. Pursuant to the requirements of Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396, a brief in support of the motion has been filed. The brief, in effect, states that an appeal in this case would be wholly frivolous and without merit. Defendant was mailed copies of the petition and brief on August 10, 1973, and was informed that he had until October 15, 1973, to file any additional points he might choose in support of his appeal. He has not responded.

In the motion and brief in support, the Public Defender has shown that all possible points which could arguably be raised on appeal were thoroughly considered before the motion to withdraw

was filed. The victim was the single witness to the armed robbery and rape. The Public Defender notes that there is no question in the record that her testimony as to the identification of defendant was clear and convincing. Our review of the record shows that the identification was indeed clear and convincing. The victim had the opportunity to observe defendant for one-half to three-quarters of an hour during the armed robbery and subsequent rape. The line-up in which defendant participated was not suggestive and was free of any other taint which would have required the suppression of the in-court identification of defendant.

Further, the rape and armed robbery were promptly reported to the police. The victim's face was badly bruised and a medical examination after the incident showed sperm present, ample corroboration for the rape complaint.

The defendant, before trial, moved to quash his arrest on the ground that he had been "seized" after a warrantless "search" of his house. In the instant case, the police were admitted to defendant's home by defendant's sister. She called him to the door, where he was told to come to the police station to participate in a line-up. He was placed in custody at this time. No warrant was necessary for this arrest. (Ill. Rev. Stat. 1971, ch. 38, par. 107-2.) This was not a "search" or "seizure" that would require a warrant under the Fourth Amendment.

The Public Defender states that only two other points, though completely without merit, could have been raised in this appeal. The jury waiver was considered by the Public Defender as a possible point of appeal, but our review of the record shows that this waiver was properly made. Defendant was addressed

personally by the court and his absolute right to a jury trial was explained to him as well as the results of a jury waiver. There is also no merit in the argument that defendant could not be sentenced to two concurrent terms of imprisonment since both offenses arose out of the same conduct. Robbery and rape are separate and distinct offenses, even though they may be closely connected in time as in the instant case. The armed robbery was complete before defendant attempted to rape the victim. He took the money from the woman first, then taking her to the back of the store he tied her up, spoke with her, and then raped her. This same contention was discussed in People v. Harper, 50 Ill. 2d 296, 278 N.E. 2d 771, where it was stated:

"While it is true that the rape and robbery occurred in a series of acts committed at the same place and within a short time, it is equally true that they constituted separate acts involving different elements. As such, they were separate offenses for which concurrent sentences were both constitutionally and statutorially permissible." (50 Ill. 2d 302.)

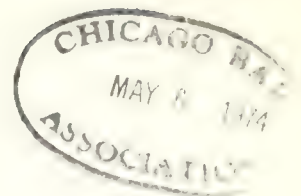
The concurrent sentences of from six to twelve years for each offense are therefore proper.

We have carefully examined the record on appeal. The proceedings comply with Anders v. California, supra. The Public Defender has cited authorities to support his analysis of the record and his opinion that defendant's appeal in this case is wholly frivolous and without merit. We conclude that there is no merit in this appeal and that for defendant to pursue it would be frivolous.

The Public Defender's motion to withdraw as defendant's appellate counsel is granted. The judgment of the Circuit Court of Cook County is affirmed.

MOTION ALLOWED;
JUDGMENT AFFIRMED.

Burman, J., and Dieringer, J., concur.
(Abstract Only)



59070

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Respondent,	)	APPEAL FROM
)	
v.	)	CIRCUIT COURT,
)	
	)	COOK COUNTY.
JESSE HERNANDEZ,)	
	)	Hon. Fred G. Suria, Jr.,
	)	Presiding.
Defendant-Petitioner.)	

Mr. JUSTICE DIERINGER delivered the opinion of the court:

The defendant, Jesse Hernandez, pleaded guilty in the Circuit Court of Cook County on March 11, 1970, to information charging him with the possession of heroin, and he was sentenced to a term of three to six years.

No direct appeal was taken from the conviction, but on March 14, 1972, the defendant filed his post-conviction petition pro se, alleging that his constitutional right of due process of law was violated in that he did not voluntarily and understandingly enter his plea of guilty because at the time of his plea he was suffering from symptoms of narcotic withdrawal.

On March 14, 1972, the Public Defender's office filed its appearance on behalf of the defendant, and the State then filed its motion to dismiss the petition, alleging that no constitutional questions were raised by the petition and that any allegations which might in their broadest sense be construed as raising such constitutional questions were merely bare allegations and not sufficient to require a hearing.

After hearing arguments of counsel, the trial court sustained the State's motion to dismiss, and the defendant appeals from that judgment.

The Public Defender now seeks to withdraw and has filed a brief in support of his motion pursuant to the case of Anders v. California, (1967) 386 U.S. 738. He states the only possible

basis for appeal would be whether the trial court abused its discretion in dismissing the post-conviction petition thereby abridging the defendant's right to due process of law.

The only claim presented in the defendant's petition for post-conviction relief is that his plea of guilty was not voluntarily and understandingly given. He states he was a patient at a drug abuse center until nine days prior to his trial in Criminal Court, and that at the time he entered his guilty plea he was suffering from withdrawal symptoms due to narcotic addiction. No affidavits supporting these allegations were submitted nor was their absence explained.

In the case of People v. Jennings, (1952) 411 Ill. 21, the court held that where there are no supporting affidavits and their absence is neither explained nor excused, the trial court should either dismiss the petition or grant further time in order that such affidavits may be obtained. In the instant case the record reveals the trial judge granted a continuance for the purpose of obtaining more specific information from the defendant concerning his allegations in the petition. The defense counsel advised the defendant by letter that unless more specific information was received, his petition would probably be dismissed. No further information was received from the defendant.

The defendant received a copy of the Public Defender's motion and brief and was also sent a letter advising him he had until December 1, 1973, to file any argument and authority in support of his appeal, but he chose not to do so.

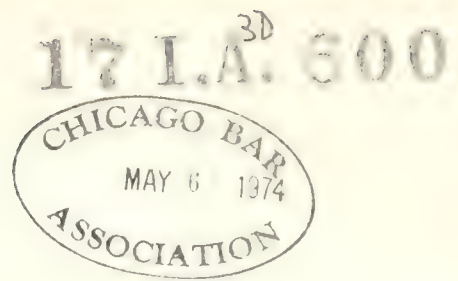
After an examination of the record, we conclude the Public Defender is correct and there is no merit to the appeal. The motion of the Public Defender to withdraw as counsel for the defendant is allowed, and the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

2-6-1974
2th Div
10 a.m.



No. 58457

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
ROBERT WRIGHT,	)	HONORABLE
	)	MAURICE W. LEE,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Robert Wright, defendant, was charged by complaint with contributing to the sexual delinquency of a child (Ill. Rev. Stat. 1971, ch.38, par.11-5(a)(1) and contributing to the delinquency of a child (Ill.Rev.Stat. 1971, ch.23, par. 2361(a).) After a bench trial, defendant was found guilty of both charges and sentenced to a term of 90 days to be served at the Illinois State Farm, Vandalia, Illinois, on each charge, the sentences to run concurrently. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt on either charge and that the trial judge committed reversible error when he allowed the complaining witness' mother to remain in the courtroom during the complaining witness' testimony.

At trial, the following evidence was adduced: Launa Hobson testified that she is the mother of Janet Hobson. Janet Hobson was born on January 1, 1955, and is 17 years of age. During March, 1972, Janet Hobson left home on a Wednesday and did not return until the Monday of the following week.

Janet Hobson, age 17, testified that on March 15, she left home after a fight with her mother. She stayed with Robert Wright and Diane Evans at 4007 W. Polk Street, Chicago, Illinois, Mr. Wright's apartment. She stayed in the apartment

for approximately one week during which she slept on a mattress in the living room. On March 16, 1972, she had intercourse with the defendant on two occasions, once in the bedroom and once in the living room. Her mother signed a complaint against the defendant in April, 1972.

Robert Wright, defendant, testified that in March, 1972, he was living with Diane Evans. On March 15, 1972, Janet Hobson came to his apartment and stated that she had had a fight with her mother. Janet Hobson left the apartment that day and did not return at any time on March 16, 1972. Defendant denied ever having intercourse with Janet Hobson and stated that he did not have a mattress in the living room of his apartment.

Diane Evans testified that in March, 1972, she was living with Robert Wright at 4007 W. Polk Street, Chicago, Illinois. On March 15, 1972, Janet Hobson came to the apartment at approximately 5:00 P.M. and stayed for a short time. Janet Hobson then left the apartment and did not return that evening or at any time on March 16.

Defendant's first argument on appeal is that the State failed to prove him guilty beyond a reasonable doubt of contributing to the sexual delinquency of a child because they failed to prove by credible testimony that a sexual act occurred. In reviewing a conviction for the offense of contributing to the sexual delinquency of a child, a reviewing court is charged with a special duty to exercise the utmost caution and circumspection in scrutinizing the sum and substance of the evidence upon which the conviction is predicated. (People v. Poynter, 6 Ill.App.3d 113, 285 N.E.2d 171.) However, as in any other charge, a reviewing court must always consider that it is the function of the trier of fact to weigh the credi-

bility of witnesses and otherwise evaluate the evidence presented at trial. (People v. Springs, 51 Ill.2d 418, 283 N.E.2d 225.) The testimony of the prosecutrix alone, if clear and convincing, is sufficient to sustain a conviction on the charge of contributing to the sexual delinquency of a child, even though it is not corroborated. People v. Halteman, 10 Ill.2d 74, 293 N.E.2d 341.

In the case at bar, the testimony of Janet Hobson was clear and convincing. She testified that on March 15, 1972, she ran away from home and, for a period of approximately one week, stayed in defendant's apartment. She testified that on March 16, 1972 she had intercourse with the defendant on two occasions, once in the bedroom and once in the living room. This testimony constituted a sufficient basis upon which the trial court judge could conclude that defendant was proven guilty beyond a reasonable doubt.

Defendant's second argument is that the evidence failed to establish his guilt beyond a reasonable doubt of the offense of contributing to the delinquency of a child because the evidence failed to prove that he acted with knowledge or willfulness. Defendant was charged with contributing to the delinquency of a child in violation of section 2361(a) (Ill. Rev.Stat. 1971, ch.23, par.2361(a).) That statute reads:

"Any person who knowingly or wilfully causes, aids or encourages any boy or girl to be or to become a delinquent child, or he knowingly or wilfully does any acts which directly tend to render any such child so delinquent is guilty of the crime of contributing to the delinquency of children***"

To sustain a conviction under this statute, it is necessary for the State to establish that the defendant acted knowingly

or wilfully. However, knowledge may be proven by circumstantial evidence. People v. Zazzetti, 6 Ill.App.3d 858, 286 N.E.2d 745.

In the case at bar, the evidence established that Janet Hobson ran away from home and, for a period of one week, stayed in defendant's apartment. During this period of time, defendant knew that she was a run-away and, nevertheless, defendant provided her with food and lodging. Defendant had intercourse with her on two occasions. This evidence was sufficient to constitute a basis upon which to conclude that defendant's acts were committed knowingly. (See Ill.Rev.Stat. 1971, ch.38, par.4-5.) By his finding of guilty, the trial judge demonstrated that he believed Janet Hobson's testimony and believed that the defendant's acts were committed with knowledge. After a review of the entire record, we conclude that the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.

Defendant's final contention is that the trial court committed reversible error when it allowed Launa Hobson to remain in the courtroom during the testimony of her daughter, Janet Hobson. After Launa Hobson had concluded her testimony, defense counsel moved to exclude all witnesses and specifically asked that Launa Hobson be ordered from the courtroom. The trial judge inquired if Launa Hobson was going to be recalled to testify. Defense counsel replied only that he wanted her excluded from the courtroom during the testimony of her daughter. The exclusion of witnesses is a matter within the sound discretion of the trial court and the exercise of that discretion will not be disturbed on

review unless a clear abuse or prejudice to the defendant is shown. (People v. Chennault, 24 Ill.2d 185, 181 N.E.2d 74; People v. Jenkins, 10 Ill.App.3d 588, 295 N.E.2d 123.) In the case at bar, the motion to exclude witnesses was not made until after Launa Hobson had testified and she was not recalled as a witness in the case. Defendant has not shown any abuse of the trial court's discretion in allowing Launa Hobson to remain in the courtroom during the testimony of her daughter and has failed to show any prejudice resulting therefrom.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.



171A.301

No. 58621

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Respondent-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY.
ABBAS SADEGHZADEH,)	HONORABLE
Petitioner-Appellant.)	JACQUES F. HEILINGOETTER,
	PRESIDING.

Mr. JUSTICE MCGLOON delivered the opinion of the court:

At the conclusion of a bench trial in 1968 the defendant Abbas Sadeghzadeh, was convicted of the offense of aggravated battery and sentenced to seven to ten years imprisonment. An appeal of that conviction was affirmed by the appellate court. (124 Ill.App.2d 375, 260 N.E.2d 447.)

In October, 1971, a pro se post-conviction petition was filed (Ill.Rev.Stat. 1971, ch.38, Art.122.) Counsel was appointed and an amended petition was filed in February, 1972. The amended petition alleged that defendant was not afforded competent counsel at his bench trial; that he was denied due process of law when the trial court appointed a psychiatrist employed by the executive branch of government to examine him prior to trial; and that his sentence was in violation of the constitutional prohibition against cruel and unusual punishment because of certain facts surrounding his earlier confinement. Upon the State's motion the amended petition was dismissed without a hearing and the defendant has appealed that order.

We affirm.

The Post-conviction Hearing Act is a statutory remedy not intended to provide for the relitigation of the defendant's guilt or innocence. It is open to those who allege that there was a substantial denial of their constitutional rights during

the proceedings which resulted in their conviction. (Ill. Rev.Stat. 1971, ch.38, par.122-1.) The Act requires that a petition be supported by "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." (Ill.Rev.Stat. 1971, ch.38, par. 122-2.)

The cases have repeatedly held that an evidentiary hearing under the Act should be granted only if defendant's petition makes a "substantial showing of a violation of constitutional rights, and allegations which merely amount to conclusions are not sufficient to require a post-conviction hearing." (People v. Knight (1967) 38 Ill.2d 373, 375, 232 N.E.2d 292; People v. Evans (1967) 37 Ill.2d 27, 224 N.E.2d 778; People v. Ashley (1966) 34 Ill.2d 402, 216 N.E.2d 126; People v. Arbuckle (1969) 42 Ill.2d 177,179, 246 N.E.2d 240.) Such showing must be based on factual allegations rather than conclusional statements. People v. Hysell (1971) 48 Ill.2d 522, 272 N.E.2d 38.

The proper focus of concern at a hearing upon the State's motion to dismiss a post-conviction petition is the sufficiency of its allegations and supporting documents. (People v. Price (1970) 44 Ill.2d 332, 333, 255 N.E.2d 395; People v. Airmers (1966) 34 Ill.2d 222, 226, 215 N.E.2d 225.) There were no supporting documents submitted with either the original or amended petition in the instant case.

The defendant first contends that he was denied competent counsel at trial. In this regard his amended petition alleges that on the day set for trial the assistant public defender who had represented him withdrew, and was replaced by another assistant public defender who, on that day, adopted

a new trial "strategy" with which the defendant did not agree. In further argument the defendant contended that his new counsel's lack of investigation was manifest in the fact that he did not call as a witness a certain person the defendant contends may have substantiated his defense.

In dismissing this portion of the petition the trial judge stated that he didn't feel that it could be suggested "in a vacuum" that certain investigations were or were not made on behalf of the defendant. We agree with the trial judge that the defendant's petition, without supporting documentation, does not make a substantial showing of a violation of his constitutional rights.

In People v. Hill (1970) 44 Ill.2d 299, 255 N.E.2d 377, the defendant appealed from the dismissal of his amended post-conviction petition which alleged incompetency of counsel at the original trial. In affirming the dismissal as not requiring an evidentiary hearing the court stated:

"In testing the claim that a defendant was denied his constitutional right of trial through incompetence of counsel, this court has said that, before a conclusion of inadequate representation can be reached, defendant must demonstrate the actual incompetence of counsel as reflected by the manner of carrying out his duties as a trial attorney, and it must further appear that substantial prejudice results therefrom, without which the outcome would probably have been different." (44 Ill.2d at 303-04.)

An example of a case where the post-conviction allegation of incompetency of trial counsel was sufficiently demonstrated in a post-conviction petition is People v. Stepheny (1970) 46 Ill.2d 153, 263 N.E.2d 83. In that case the petition had attached to it two supporting statements by persons who, although not called as witnesses at trial, had information material to the petitioner's defense to the charge of murder. These

statements recited facts, known to the makers, that could have changed the outcome of the trial. On these facts the court concluded that the petition was sufficient to require an evidentiary hearing.

The instant petition is similar to the unsupported petition disposed of in Hill. Neither the original nor the amended petition here contains the supporting documentation necessary to remove the defendant's allegations regarding his trial counsel from the category of conclusions to one of "substantial showing" of a violation of his rights. As the trial judge correctly concluded, the post-conviction petition must demonstrate the actual incompetence of counsel and not merely make allegations "in a vacuum".

The defendant's second contention is that he was deprived of his liberty without due process of law when he was examined as to his competency to stand trial by Dr. Haines, director of the Behavior Clinic of the circuit court of Cook County, while, the defendant alleges, Dr. Haines was on the payroll of the Cook County Department of Public Aid, a subdivision of the executive branch of county government. The defendant reasons that because Dr. Haines was being paid by the executive branch of government and performing a judicial function this arrangement violated the doctrine of Separation of Powers and denied him due process of law.

We need only point out in regard to this contention that it suffers from the same defect discussed above. The allegations that Dr. Haines was employed by the executive branch of government but performing a judicial function when he examined the defendant thereby denying the defendant due

process of law, are mere conclusions that do not make a "substantial showing" of denial of a constitutional right.

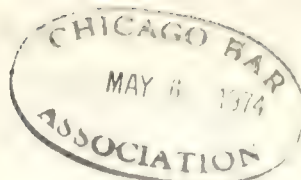
Finally, the defendant contends he was the victim of cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution, when, after being severely beaten and disabled while a prisoner in the House of Correction prior to his trial, he was sentenced to seven to ten years upon his conviction for the offense of aggravated battery. The petition discloses that on or about April 2, 1968 the defendant was arrested on the instant charge and confined in the House of Correction. On that date and while confined he was the victim of a severe beating which resulted in permanent physical disability and as a result of which he won a civil judgment against the City of Chicago in federal district court. He concludes that in view of this fact his sentence of 7 to 10 years is violative of his constitutional protection against cruel and unusual punishment. However, we cannot agree.

The incident that occurred at the House of Correction took place prior to trial and certainly constituted no part of the punishment imposed upon the defendant as a result of his conviction of the offense charged and therefore does not constitute cruel and unusual punishment prohibited by the Constitution. (Hill v. State (1969) 119 Ga.App. 612, 168 S.E.2d 327.) Therefore we find defendant's continued confinement is not cruel and unusual punishment.

For these reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McNamara, P.J. and Mejda, J., concur.



17 I.A.^{3D} 603

No. 58697

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
TAFT JONES,	)	HONORABLE
	)	THOMAS P. CAWLEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

Defendant, Taft Jones, was charged with theft in violation of Section 16-1(a)(1) of the Criminal Code. (Ill.Rev.Stat. 1971, ch.38, par.16-1(a)(1).) After a bench trial, he was found guilty and sentenced to 120 days in the House of Correction.

The sole issue raised by the defendant on appeal is that the evidence failed to establish his guilt beyond a reasonable doubt. At trial, the complaining witness, Ronald Johnson, testified that on October 11, 1972, he was walking on South Kedvale Avenue, in Chicago, when defendant's cousin grabbed him from the rear and defendant, facing him from the front, took \$11.00 from his pants pocket, tearing the pocket. He positively identified the defendant. This evidence was sufficient to support defendant's conviction, even though defendant presented evidence to the contrary. No error of law appears in the record and a full opinion would have no precedential value. There is no reasonable doubt as to defendant's guilt. The judgment of conviction is accordingly affirmed.

This opinion is filed pursuant to Illinois Supreme Court Rule 23 (50 Ill.2d, Rule 23.)

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.



58848

PEOPLE OF THE STATE	)	APPEAL FROM
OF ILLINOIS,	)	CIRCUIT COURT
	)	COOK COUNTY
Plaintiff-Appellee,)	
)	
v.)	_____
)	
ROBERT POWELL, a/k/a)	
EUGENE THOMPSON,	)	HONORABLE
	)	EARL E. STRAYHORN,
Defendant-Appellant.	)	Presiding.

PER CURIAM:

Robert Powell, a/k/a Eugene Thompson, defendant, was found guilty, after a bench trial, of the offense of armed robbery in violation of section 18-2 of the Criminal Code [Ill.Rev.Stat. 1971, ch. 38, par. 18-2]. He was sentenced to a term of four to seven years.

The sole issue raised by defendant on appeal is that the evidence failed to establish his guilt beyond a reasonable doubt. At trial Robert Baymon testified that on April 27, 1972, he and David Holiday were returning home when their truck stalled in the area of Washburn and Hoyne, Chicago. Defendant approached their stalled vehicle, put a gun to Baymon's head, then forced both men into a vacant lot where he took \$21.00 from Baymon's pocket. As he started to take the money from Holiday, Baymon ran and flagged down a nearby squad car. When the police officer returned with him to the scene, Baymon identified the defendant standing on the street in a group of people.

Chicago Police Officer Reiff testified that on April 27, 1972, Baymon flagged down his squad car and told him he had just been robbed. Upon returning with Baymon to the scene

of the crime, Baymon identified defendant who was standing on the street with a group of people.

This evidence was sufficient to support defendant's conviction, even though defendant presented evidence to the contrary. No error of law appears in the record, and a full opinion would have no precedential value. There is no reasonable doubt as to defendant's guilt. The judgment of conviction is accordingly affirmed.

This opinion is filed pursuant to Illinois Supreme Court Rule 23.

Judgment affirmed.

THIRD DIVISION:

Justice Dempsey did not participate.



171.A.605³⁰

57293

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
LAMENT BUGG, etc.,	)	HONORABLE
	)	RICHARD J. FITZGERALD,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM*(FIRST DISTRICT, FIFTH DIVISION):

Defendant appeals from a trial court judgment revoking his probation and sentencing him to concurrent sentences of three to five years on Indictment Numbers 70-2776 and 70-2977.

Defendant contends the sentences on revocation of probation were excessive because the trial court was under the erroneous impression that probation had been granted on two charges of armed robbery rather than plain robbery, and the sentences were excessive under the Unified Code of Corrections.

On February 24, 1971, defendant pleaded guilty to the robbery of David Lilly on July 24, 1970, as set forth in Indictment No. 70-2776 and to the robbery of George Hawkins on July 24, 1970, as set forth in Indictment No. 70-2977. He was granted probation with the first year to be served in the House of Correction. At the time probation was granted, the trial court stated:

"Now, you realize, Mr. Bugg, if you violate this probation and don't make these repayments and do anything wrong that I can sentence you to the Illinois State Penitentiary, and I will, if you violate the terms and conditions of the probation, I will sentence you to the Illinois State Penitentiary for not less than three nor more than five years."

The order granting probation in Indictment No. 70-2776 recites that the defendant was found guilty of armed robbery. The probation order in Indictment No. 70-2977 states that the defendant was found guilty of robbery.

* Judge Barrett did not participate.

On November 23, 1971, a rule to show cause why probation should not be revoked was filed in which it was alleged that the defendant was admitted to probation "on February 24, 1971, for five years after a conviction of Armed Robbery, in Indictment #70-2776 and Robbery, #70-2977 and he was ordered to make restitution of \$75"; and that on August 18, 1971, he was "charged with Criminal Trespass to Vehicle, #71-MC-61298 and was sentenced to serve a term of 45 days in the House of Correction."

On December 2, 1971, another rule to show cause why probation should not be terminated was filed in Indictment No. 70-2776 in which it was alleged that on August 18, 1971, the defendant, alias Connie Crowder, entered a plea of guilty to two counts of theft on complaints #71-MC-615337, #71-MC-615336 and was thereupon sentenced to serve a term of 45 days in the County Jail.

On December 10, 1971, a violation of probation hearing was held. Police Officer Walter Zamolewicz testified as to the facts pertaining to the guilty findings of August 18, 1971. Defendant testified that he pleaded guilty because he did not "want to face the Grand Jury because I had been up to the Grand Jury before for three counts of robbery." During closing argument the Assistant State's Attorney stated:

"We feel we have met our burden of preponderance for violation of the defendant's probation which he was on to your Honor in Indictment 70-2977, robbery, and 70-2776, armed robbery."

After a hearing in aggravation and mitigation, the court said:

"Well, in view of the charges set forth in the rule, and the admonition I originally gave to this defendant, it would be the judgment of this Court that defendant be sentenced to the State Penitentiary for a period of not less than three nor more than five years on each, on the said indictments, and that the sentence will run concurrent on each."
[Emphasis supplied.]

The order revoking and terminating the order of probation on Indictment No. 70-2776 provided:

"Defendant sentenced to the Illinois State Penitentiary on VIOLATION OF PROBATION heretofore entered and Judgment rendered for the crime of ROBBERY in manner and form as charged in the indictment in this cause.

"THEREFORE, it is further Ordered and Adjudged by the Court that the said Defendant be and he is hereby sentenced to a term of imprisonment to be confined in the Illinois State Penitentiary for a term of years not less than THREE (3) years nor more than FIVE (5) years."

The order also provided that the sentences imposed in General Number 70-2776 and General Number 70-2977 run concurrently.

The People filed in this court a motion to confess error as to the defendant's argument that the sentences were excessive under the Unified Code of Corrections but asked the court to affirm the trial court judgment in all other respects. The motion was taken with the case.

Opinion

Defendant contends "that his sentence was excessive because the Court mistakenly understood that probation had originally been granted on both a plain robbery and an armed robbery," while in fact the probation was granted on two plain robbery charges. Defendant argues, without citation of authority, that "since armed robbery is a more serious crime than plain robbery and punishable by a more severe prison sentence the defendant contends that the prison sentence imposed upon him following the revocation of probation would have been of a lesser duration had the Court not been erroneously apprised that the defendant had been originally convicted of armed robbery."

It is apparent there are inconsistencies in the record. The record shows that the trial court found the defendant "guilty

of plain robbery in manner and form as charged in Indictment #70-2776 and Indictment #70-2977" and placed him on probation for a period of five years with the first year to be served in the County Jail. The common law record reciting the judgments is in compliance with the findings and judgments of the trial court. The fact that General Number 70-2977 is described as General Number 70-2777 in said judgment orders is merely a typographical error and excusable. (People v. Bates, 9 Ill. App. 3d 882, 293 N.E.2d 358.) A typographical or clerical error is a formal rather than a substantive defect. People v. Parr, 130 Ill. App. 2d 212, 220, 264 N.E.2d 850; People v. West, 128 Ill. App. 2d 63, 262 N.E.2d 323.

The law is clear that when there are inconsistencies in the record, the reviewing court should consider the matter on the basis of the record as a whole. People v. Williams, 27 Ill. 2d 327, 189 N.E.2d 314; People v. Caruth, 4 Ill. App. 3d 527, 281 N.E.2d 349; People v. Brown, 14 Ill. App. 3d 196, 302 N.E.2d 101.

Although the respective rules to show cause stated that the defendant was convicted of "armed robbery, in Indictment #70-2776" and although the Assistant State's Attorney described Indictment 70-2776 as armed robbery, it is apparent, after reviewing the entire record, that the revocation of probation and the defendant's sentences of from three to five years in the penitentiary were based upon the trial court's knowledge that the defendant pleaded guilty to plain robbery in both Indictment 70-2776 and Indictment 70-2977. This is especially evident since the trial court admonished the defendant at the time he granted defendant probation that if the defendant violated the terms and conditions of the probation, he would sentence defendant to the Illinois State Penitentiary for not less than three nor more than five years; and later, when the trial court sentenced defendant, he

expressly referred to this original admonition. Further, at the time of the occurrence a sentence of three to five years in the penitentiary was a permissible sentence for robbery. Ill. Rev. Stat. 1971, ch. 38, par. 18-1.

The inconsistencies in the record are inconsequential and not so material as to justify a vacatur of the sentences.

Defendant also argues that his three to five year sentences were excessive under the Unified Code of Corrections. The People concede that the minimum sentences do not comply with the provisions of Section 5-8-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1) which provides that the minimum term shall not be greater than one-third of the maximum set by the trial court as to Class 2 felonies. Robbery is a Class 2 felony (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 18-1) punishable by any term in excess of one year but not exceeding 20 years (Ill. Rev. Stat. 1972 Supp., ch. 38, par. 1005-8-1). The minimum sentences of three years will be reduced to 20 months. People v. Collins, 14 Ill. App. 3d 446, 449-450, 302 N.E.2d 709.

The judgments are affirmed and the sentences modified by reducing the minimum sentences to 20 months, and, as modified, said sentences are affirmed.

JUDGMENTS AFFIRMED;
SENTENCES MODIFIED.

Abstract only.

No. 58686

PEOPLE OF THE STATE OF ILLINOIS,)
Respondent-Appellee,)
v.)
EDDIE G. BOLDEN,)
Petitioner-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
EARL E. STRAYHORN
PRESIDING

PER CURIAM¹ (First District, Fifth Division):

After plea bargaining negotiations, petitioner entered pleas of guilty and was sentenced to concurrent terms of 20 to 30 years for murder and one to two years for attempt robbery. No appeal was taken but defendant filed a pro se post-conviction petition alleging violations of his constitutional rights. The public defender was appointed counsel and filed a "supplemental" post-conviction petition alleging a violation of due process because the record failed to affirmatively disclose the terms of the plea bargaining negotiations. Respondent's motion to dismiss was granted without an evidentiary hearing. On appeal petitioner contends that the alleged failure of the record to reflect the plea bargaining negotiations as required by paragraph (b) of Supreme Court Rule 402², raised a substantive constitutional question.

OPINION

The fact that petitioner did not appeal from the original judgments of conviction would not preclude his right to raise matters in a post-conviction proceeding which may have existed concerning the constitutionality of his imprisonment. People v. Rose, 43 Ill.2d 273, 253 N.E.2d 456.

We have carefully examined the record and we are satisfied that the admonishments given by the trial court at the hearing on the change of plea clearly establishes that defendant's pleas of

¹ Justice Barrett did not participate.

² Ill. Rev. Stat. 1971, ch. 110A, par. 402(b).

guilty were entered knowingly, understandingly and voluntarily and that in this regard, his rights as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, were not violated. However, it is also apparent, from the record, that the terms of the plea agreement were not confirmed by the court by questioning defendant personally in open court, as required by paragraph (b) of Rule 402.

This brings us squarely to the heart of defendant's argument that Rule 402 embodies the due process requirements of Boykin and that the failure to conform to paragraph (b) thereof was a denial of those requirements, which raises a constitutional issue regarding the guilty plea and requires an evidentiary hearing. The State contends that the admonishments given by the court satisfied the requirements of Boykin and that the failure of the court to reflect the terms of the plea agreement, as required by paragraph (b), did not raise a constitutional question.

Defendant refers us to only one Illinois case, People v. Ridley, 5 Ill.App.3d 680, 284 N.E.2d 37, which he states is identical to the instant case. In Ridley, after admonishing defendant, the trial judge accepted a plea of guilty but the terms of the plea agreement were not stated in open court as required by paragraph (b) of Rule 402. On appeal this court held such failure to be reversible error. In the case at bar, no appeal was taken and Ridley, not involving a post-conviction petition, is not identical. Nor is it controlling because, as we view it, although Ridley is authority for the rule that failure to conform to paragraph (b) requires reversal, it does not declare that such failure is a violation of due process.

We are of the opinion that the provision of paragraph (b) of Rule 402 requiring that the terms of plea agreements be spread of record, is created by that rule only, and is not of constitutional origin. In view thereof, having determined here that the pleas of guilty were entered knowingly, understandingly

and voluntarily and in satisfaction of the Boykin requirements, we believe that the failure to have the terms of the plea agreement stated in open court, although in violation of Rule 402(b), does not involve a constitutional question.

Accordingly, we conclude the trial court correctly dismissed the post-conviction petition without an evidentiary hearing and we, therefore, affirm.

Affirmed.

(Publish abstract only.)



171.A.615

58706

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT
	)	OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
WILLIE LAWRENCE,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM* (FIRST DISTRICT, FIFTH DIVISION):

Defendant was found guilty after a bench trial of the offense of unlawful use of weapons in violation of paragraph 24-1(a)(4) of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 24-1(a)(4)). He was sentenced to one year to one and one-half years. Defendant argues that it was error for the trial judge to refuse to hold a hearing on his motion to quash an arrest warrant.

On February 4, 1971, defendant was arrested pursuant to an arrest warrant issued by Judge Robert Sulski for the robbery of Frank Davis on January 10, 1971. On February 5, 1971, a hearing was held at which Davis testified that the defendant was not the perpetrator of the robbery. Defendant was subsequently discharged. Thereafter, on March 25, 1971, a second arrest warrant was issued by Judge Sulski charging defendant with the same armed robbery of Frank Davis occurring on January 10, 1971. Defendant was arrested on the second warrant and a .22 caliber revolver containing 5 rounds of live ammunition was found on his person.

Prior to trial defendant filed a motion to quash the arrest warrant and suppress evidence alleging that Judge Sulski, in issuing the second arrest warrant, did not hear testimony under oath. Defendant requested a hearing to prove his allegation. The State filed a written response to defendant's motion to quash in which they alleged that on February 25, 1971, Frank Davis personally

* Judge Barrett did not participate.

appeared before Judge Sulski and under oath testified that on February 5, 1971, he had lied when he testified that defendant was not the perpetrator of the robbery because his life had been threatened by three men.

The trial judge refused to hold a hearing on the motion to quash stating that he would not go behind the warrant. Defendant appeals that ruling.

Opinion

Defendant's only argument on appeal is that it was reversible error for the trial judge to refuse to hold a hearing on his motion to quash the second arrest warrant. However, in the record filed in this court defendant has not seen fit to include the second arrest warrant. It is the appellant's duty to see to it that the record is complete upon review. "Where the record is incomplete, a reviewing court will indulge every reasonable presumption in favor of the judgment or order. Any doubt arising from the incompleteness of the record will be resolved against the appellant." (McGann v. Lurie, 15 Ill. App. 2d 297, 300, 146 N.E.2d 223, 225; People v. Cloutier, 64 Ill. App. 2d 177, 185, 212 N.E.2d 266.) Since defendant has not included the second arrest warrant in the record, he cannot now raise any argument concerning that warrant.

Without the arrest warrant, it cannot be determined whether the warrant on its face shows that Judge Sulski did not hear testimony under oath. In the absence of the second arrest warrant, we must conclude that the trial judge properly refused to hold a hearing on defendant's motion to quash that warrant. People v. Mines, 132 Ill. App. 2d 628, 270 N.E.2d 265.

The judgment is affirmed.

AFFIRMED.

Abstract only.

2/8/74
to Opinions
Jeh. Riv

58265



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
DENNIS ELLIS,	)	HONORABLE
	)	THOMAS P. CAWLEY
Defendant-Appellant.	)	PRESIDING.

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Defendant, Dennis Ellis, was convicted following a bench trial of theft in violation of Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1), and was sentenced to the Illinois State Farm at Vandalia for the term of one year. On this appeal, defendant argues that his conviction should be reversed because of an allegedly tainted in-court identification.

Alan Williams testified for the State that on August 6, 1972, at approximately 10:30 in the evening, he was at the B & W Lounge, where he had been for about 15 minutes talking with a friend. Although he is employed there, he was not on duty at the time and had not been drinking. Two men entered the bar, one of whom was defendant, and proceeded to the rear of the establishment. Williams was sitting in the middle of the bar, about 25 feet from the front door. About two minutes later, a third man entered and remained by the door. Defendant went into the washroom and when he came out, held a gun on one Jimerson and said, "It's a stick-up." The man with him told everyone to put their hands up and the defendant searched everybody, there being about 16 patrons in the bar. The defendant took a watch, a ring and \$270 in cash from him. Of this, \$110 was in his wallet and the rest was in his right front pocket. At the time defendant was taking these items from him, he held a pistol in his hand. After they searched

everybody, the three men, each of whom had a gun, ran out. About 12 minutes elapsed. He described the defendant to the police as about five feet tall, light brown complexion, natural hair and a cowlick. Someone subsequently told him the name of the man, he called the police and viewed the defendant in a lineup and picked him out after "a few seconds." He was also shown 50 snapshots on the day of the offense and identified the defendant. He did not know the defendant before this. He stated there were five people in the lineup, the defendant was in the center, with two tall and two short men. None of the other individuals in the lineup matched his description.

Chicago Police Officer Arthur Jackson testified that on August 10, 1972, he conducted a lineup in the 10th District Police Station at which Williams identified the defendant. He had arrested the defendant based on Williams giving him the defendant's name. When asked to describe the other people in the lineup, he said they all fit the size and were about the same age, and they were about an inch smaller or an inch taller than the "offender."

The court granted defendant's motion to suppress Williams' testimony concerning the identification of the defendant at the lineup, but denied a defense motion to suppress Williams' in-court identification on the theory that it was tainted by the suggestive lineup procedure. The basis of the court's ruling was that the in-court identification had a basis independent of the lineup.

A trial court's inquiry concerning the admissibility of an in-court identification is not ended by a determination that a lineup or other pre-trial confrontation has been unduly suggestive. The State must be given the opportunity to establish by clear and convincing evidence that the in-court identification had an origin

independent of the improperly suggestive pre-trial confrontation and our Supreme Court, following United States v. Wade (1967), 388 U.S. 218, has enumerated the factors bearing on the determination as follows (People v. Blumenshine (1969), 42 Ill. 2d 508, 514, 250 N.E. 2d 152):

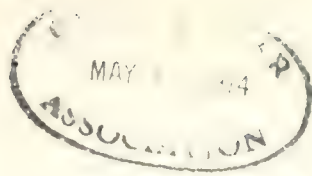
"The Supreme Court in Wade, has offered examples of factors which a trial court may consider in determining whether a witness's identification has an independent origin: 'for example, the prior opportunity [how long and how well] to observe the alleged criminal act, the existence [or absence] of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification' and any acquaintance with the suspect prior to the crime. 388 U.S. at 241; 18 L.Ed. 2d at 1165."

In the case at bar, there was clear and convincing evidence that the witness' identification of the defendant had an origin independent of the lineup procedure. Although Williams was not previously acquainted with the defendant, his identification of him at trial was positive. His only contact with the defendant occurred under circumstances which one would not likely or easily forget. Williams testified he had the opportunity to observe the defendant for about 10 to 12 minutes. He had been in the bar for about 15 minutes, and since he worked there, he was familiar with the surroundings. From where he was seated in the middle of the bar, 25 feet from the entrance, he was able to observe the defendant and his companion enter the premises and proceed to the rear. He observed the defendant exit the washroom and announce the holdup. He also observed the defendant frisk the other patrons and personally take a watch from his wrist and a ring from his hand. Defendant also took money from his pocket and his wallet. The victim's opportunity to observe the defendant at close range was excellent and it is unlikely that a person would easily forget another person he met under these circumstances. The description the victim

gave the police evidently matched the defendant, and a description of a light brown complexioned, five foot tall person with a natural hairstyle and a cowlick is a reasonably detailed and unique description. In addition, Williams picked the defendant's photograph out from among 50 pictures on the day the crime occurred. Although the trial court found the lineup procedure to be faulty, there is no evidence that the witness' identification of the defendant was unsure at any time, nor were there any conflicts or inconsistencies in the witness' identification of the defendant. While it is true that there was no direct evidence of the lighting in the premises, the defendant testified he was able to see to the door 25 feet from where he was sitting. It can reasonably be inferred that the defendant had an adequate opportunity to observe the defendant at close range going through his pocket and removing a ring and a watch from his finger and wrist, if he was able to see him at a distance of 25 feet. We, therefore, conclude that the defendant's in-court identification of the defendant was based, not on the lineup, but on the witness' opportunity to observe the defendant during the perpetration of the offense involved. Consequently, the court properly refused to suppress the in-court identification. Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

*Burke, J., took no part.

171-A-621^{3D}

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY,
)	
v.)	
)	
IRA TOWNSEND,	)	HONORABLE
	)	THOMAS P. CAWLEY,
Defendant-Appellant.	)	PRESIDING.

* PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Ira Townsend, defendant, was charged by two separate complaints with theft in violation of section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). After a bench trial, defendant was found guilty of both charges and was sentenced to a term of six months in the House of Correction on each charge, the sentences to run concurrently. Defendant appeals, arguing (1) that he did not knowingly and understandingly waive his right to a jury trial; (2) that the evidence was insufficient to establish his guilt beyond a reasonable doubt; and (3) that he was improperly convicted and sentenced on both charges.

At trial, the following evidence was adduced: Mary Seitzinger testified that on August 17, 1972, she resided at 1874 North Hoyne, Chicago, Illinois, with her two sisters, Stan Kusiak and her parents. They all shared one mail box at that address. She identified People's Exhibit #1 as a book which she had ordered, which was addressed to her, and People's Exhibit #2 as a bill from Grolier Enterprises, Inc., addressed to the parents of Leslie J. Seitzinger. She is the mother of Leslie J. Seitzinger. She did not give anyone permission to take the book.

Christine Kusiak testified that on August 17, 1972, she resided at 1874 North Hoyne with her husband, her two sisters and her parents. She was a member of the World of Beauty Club and received mail from them on a regular basis. She shared the same mail box as Mary Seitzinger. She identified People's Exhibit #3

as a box mailed from the World of Beauty Club, the same type she usually received from the club. She had ordered products from the World of Beauty Club in August, 1972, which she never received. She did not give the defendant permission to enter her mail box.

Arthur H. Anderson testified that on August 17, 1972, he resided at 1879 North Hoyne, Chicago, Illinois. On August 17, 1972, at approximately 12:45 P.M., he was in the front yard of his home when he observed the defendant walk by 1874 Hoyne several times with four other boys. He observed the defendant run up the stairs of 1874 Hoyne to the area of the mail box and grab a pink package and several letters. The defendant ran down to the corner, tore open the package and handed some of the contents to one of the other men. Defendant then threw the empty package between the sidewalk and the curb. Anderson testified that he had seen the defendant around the neighborhood on several prior occasions and knew that he did not live at 1874 Hoyne. Anderson identified People's Exhibit #3 as the package he observed the defendant take.

Sally Anderson, the wife of Arthur Anderson, testified that on August 17, 1972, at approximately noon, she observed People's Exhibits #1, #2, and #3 in the mail box at 1874 North Hoyne, Chicago, Illinois. Later that afternoon, she saw a group of men, including the defendant, with all three objects in their possession. The men were tearing open the package. After the men left, she sent her son over to retrieve what was left of the mail. She subsequently turned the items over to the police department.

James Ferolo, a Chicago Police officer, testified that on August 17, 1972, he was assigned the instant case. He recovered People's Exhibits #1, #2 and #3 from Mrs. Anderson, which were

subsequently turned over to the postal inspector.

Alfred Awlen, a special investigator for the United States Postal Inspection Service, testified that on August 17, 1972, he picked up People's Exhibits #1, #2 and #3 from the Chicago Police Department.

Defendant's first contention on appeal is that he did not knowingly and understandingly waive his right to a jury trial. As to the first theft charge alleging theft from Mary Seitzinger, the following colloquy occurred:

"THE COURT: Do you wish to be tried by this court or by a jury?

"MR. TOWNSEND: This court.

* * *

"THE COURT: Do you wish to be tried by this court or by a jury?

"MR. TOWNSEND: This court.

"THE COURT: Do you know what a jury is, twelve people would decide your fate. You are waiving that right if you want me to hear it. Do you understand that?

"MR. TOWNSEND: Yes."

Thereafter, the State filed a second theft charge alleging theft from Christine Kusiak and after some discussion regarding that charge, the following colloquy occurred:

"THE COURT: ***On this case, plea not guilty, jury waived?

"MR. PTACEK (defense counsel): Yes, your Honor."

There is no specific formula for determining whether a defendant understandingly and knowingly waives his right to a jury trial. (People v. Richardson (1965), 32 Ill. 2d 497, 207 N.E. 2d 453.) Each case depends upon the particular facts and circumstances of that case. (People v. Wesley (1964), 30 Ill. 2d 131, 195 N.E. 2d 708.) A lengthy explanation of the consequences

of a jury waiver is not a prerequisite for the validity of that waiver. People v. Bradley (1970), 131 Ill. App. 2d 91, 266 N.E. 2d 469.

As to the first theft charge, the transcript demonstrates that the trial judge inquired of the defendant whether he wished to be tried by a jury trial or a bench trial. Defendant replied that he wanted a bench trial. The trial judge went further and explained to the defendant what a jury trial consisted of and that by waiving a jury, he would be waiving the right to have twelve people decide whether he was guilty or innocent. Defendant specifically stated that he understood this. In light of the above discussion, we conclude that the waiver of a jury trial by the defendant as to the first theft charge was knowingly and understandingly entered.

As to the second theft charge, the transcript demonstrates that after the additional complaint was filed, the trial judge stated, "Plea not guilty, jury waived?" and defense counsel in defendant's presence replied, "Yes, your Honor." In People v. Punyko (1973), 9 Ill. App. 3d 1052, 293 N.E. 2d 672, the defendant on appeal argued that he did not knowingly and understandingly waive his right to a jury trial. The transcript demonstrated that prior to trial, the trial judge stated: "You wish to waive your right to a trial by jury, submit the cause to trial by this court?" Defense counsel responded, "That's correct." This court held that there was a valid jury waiver.

In the case at bar, defense counsel's response to the trial judge's statement regarding the jury waiver was not ambiguous and effectively waived defendant's right to a jury trial. Defendant, by not objecting to his counsel's statement, is bound by his counsel's action. (People v. Sailor (1969), 43 Ill. 2d 256, 253 N.E. 2d 397.) There is nothing in the record which would indicate that defendant's jury waiver was not knowingly and intelligently entered.

Defendant's second contention on appeal is that the evidence failed to establish his guilt beyond a reasonable doubt on the second offense of theft. Defendant argues that the evidence was insufficient to demonstrate ownership.

Ownership is an essential element of the offense of theft which must be alleged and proven. (People v. Thomas (1972), 9 Ill. App. 3d 384, 292 N.E. 2d 153; People v. Roach (1971), 1 Ill. App. 3d 876, 275 N.E. 2d 309.) In the case at bar, the complaint specifically alleged that the property stolen belonged to Christine Kusiak. At trial, Mrs. Kusiak identified People's Exhibit #3 as the type of box she normally received from the World of Beauty Club. Further, she testified that she was expecting a shipment of various cosmetics in August of 1972, which she never received. Mrs. Anderson identified People's Exhibit #3 as the box she observed in Mrs. Kusiak's mail box shortly before noon and as the same box she saw the defendant and several other boys ripping open. She then had her son retrieve the package which was subsequently turned over to the Chicago Police Department and the United States Postal Inspection Service. The package was admitted into evidence at the trial. The only reasonable inference to be drawn from this testimony was that the box from the World of Beauty Club, which was introduced into evidence as People's Exhibit #3, was the property of Mrs. Kusiak.

Defendant's final contention is that he was improperly convicted and sentenced for both thefts since they both arose out of the same conduct. It is error to sentence a defendant for two or more offenses if each offense arises out of the same conduct. (People v. Duszkevycz (1963), 27 Ill. 2d 257, 189 N.E. 2d 299.) Conduct is defined by the Criminal Code as "an act or series of acts, and the accompanying mental state" (Ill. Rev. Stat. 1971, ch. 38, par. 2-4). In the instant case, both articles were initially located in the same mail box. Defendant's conduct in taking

both articles constituted but one act. Under these circumstances, both offenses constituted but a single transaction and it was error to sentence the defendant for each offense. The sentence imposed upon the second theft charge must therefore be vacated. People v. Redding, 12 Ill. App. 3d 150, 298 N.E. 2d 238.

For the foregoing reasons, the judgment of conviction and sentence for the first theft charge are affirmed. The judgment of conviction on the second theft charge is modified and the sentence entered thereon is vacated.

Affirmed as modified.

* Burke, J., did not participate.



59101

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
JESUS A. GUZMAN,	)	HON.FRANK J. WILSON,
	)	Presiding.
Petitioner-Appellant.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Jesus A. Guzman, petitioner, was originally charged by indictment with the crime of murder. On July 29, 1968, petitioner entered a plea of guilty to the indictment and was sentenced to a term of 14 to 30 years.

On August 11, 1971, petitioner filed a pro se post-conviction petition for relief under the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.) On March 15, 1973, upon motion of the State, petitioner's pro se post-conviction petition was dismissed without an evidentiary hearing. Petitioner appeals that dismissal.

On appeal, petitioner's only argument is that he was entitled to an evidentiary hearing on the allegation in his petition that his plea of guilty was not knowingly and intelligently entered due to his lack of understanding of the English language. Petitioner's post-conviction petition was supported by three affidavits. The gist of each affidavit was that petitioner could not speak or understand the English language.

To be entitled to relief under the Post-Conviction Hearing Act, a petitioner must make a substantial showing of a denial of his constitutional rights in the proceedings which resulted in his conviction. (People v. Blewett, 11 Ill. App. 3d 1051, 298 N.E.2d 366.) An evidentiary hearing is not required where

*Mr. Justice Joseph Burke did not participate.

the record itself contradicts the allegations of the post-conviction petition. (People v. Gaines, 48 Ill. 2d 191, 268 N.E.2d 426.) Where a post-conviction petition alleges that a petitioner did not understand English and therefore did not knowingly enter a plea of guilty, and that allegation is contradicted by the record, an evidentiary hearing is not required. People v. Torres, 14 Ill. App. 3d 153, 302 N.E.2d 160; People v. Ponjavich, 10 Ill. App. 3d 649, 295 N.E.2d 16; and People v. Pineda, 9 Ill. App. 3d 1014, 293 N.E.2d 650.

In the case at bar, the transcript of petitioner's plea of guilty demonstrates that he could speak and understand the English language. Prior to accepting his plea of guilty, the trial judge asked petitioner if he could understand English. Petitioner replied, "Yes, I understand English. I went to school." Thereafter, the trial judge admonished the petitioner that he was charged with murder, that by entering a plea of guilty he was waiving his right to a trial by jury and informed him of the possible penalties. After each admonishment, the trial judge asked if petitioner understood. Petitioner in each instance replied that he did. There is no indication in the transcript that petitioner did not fully understand each admonition by the trial judge. Petitioner at all times answered questions in a logical and coherent manner. Petitioner did not at any time say or do anything which would indicate that he did not understand what was occurring. To the contrary, the transcript demonstrates that at each stage of the proceedings the petitioner understood exactly what was occurring. Under these circumstances, an evidentiary hearing was not required and the trial judge properly dismissed petitioner's post-conviction petition without an evidentiary hearing.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 19th Judicial
JAMES GIBBONS,	)	Circuit, Lake County,
	)	Illinois.
Defendant-Appellant.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

The defendant, James Gibbons, was prosecuted for the offense of burglary. He waived his right to a jury, was found guilty by the trial judge, and sentenced to three years probation with the first six months to be served at the State Farm at Vandalia.

From this conviction the defendant appeals on the ground he was entrapped in violation of Sec. 7-12 of the Criminal Code (Ill. Rev. Stat. 1961, ch. 38, sec. 7-12).

While there was some disputed testimony bearing on the question of entrapment the facts, briefly, appear to be as follows:

Defendant, one Charles Perry and one William Dawes were acquaintances and companions, and as later established by testimony introduced by defendant's counsel for the purposes of impeachment, they had been accomplices in several burglaries shortly before the commission of the crime in question.

On the afternoon of September 3, 1971, Officer Rivest of the Highland Park (Illinois) Police Department stopped William Dawes on the

street and took him to the Highland Park police station, where he questioned Dawes about several burglaries which had occurred in the vicinity of Highland Park. He testified he did this merely on a "hunch", without having any definite knowledge of Dawes' involvement in any crimes in the Highland Park area. It appears, however, from a statement later introduced by defense counsel for the purposes of impeachment that Dawes actually did at that time admit to having been involved in several burglaries, just previously, along with the defendant and Charles Perry. It is contended by the defendant that this conversation between Dawes and Officer Rivest is significant in establishing that Dawes, immediately prior to the burglary, was under a cloud and susceptible to pressure by the police.

That evening, around 8 o'clock, Officer Rivest received a telephone call from Dawes stating that a service station in the downtown area would be burglarized that night. There were at least two subsequent telephone calls from Dawes to the Highland Park police, at least one of which pinpointed the planned burglary to the Gord Leonard Service Station. Officer Dato, also of the Highland Park police, testified that Dawes told him about 3 a.m. that Gibbons and Perry were on their way to burglarize this station. The time when this occurred is in dispute, one witness placing it around 12:30 or 1:00.

About 1:30 a.m. on September 4, Officers Rivest and Dato "staked out" the Gord Leonard station and at approximately 3:30 or 4:00 a.m. they apprehended the defendant and Perry in the act of burglarizing that station. Dawes, who had been with the other two up to a few

moments before the burglary, and whose participation was to have been that of lookout and driver of the getaway car, drove off shortly before the burglary occurred.

At his trial the defendant claimed entrapment. He stated he had no intention of committing this burglary and that it was suggested to him by Dawes. Defendant implied that Dawes got the idea from the police, after they had interrogated Dawes the afternoon preceding the burglary. Dawes was not arrested or charged with any crime. On September 5, the day following the burglary, he gave a statement to the police confessing to several burglaries committed with Perry and the defendant. Before the trial Dawes disappeared and although listed as a witness and actually served with a subpoena by the defendant he did not appear at the trial. The court issued a contempt citation and granted the defendant two continuances during the trial to enable the defendant to attempt to locate Dawes, but he was not located. After the conviction of defendant and Perry on February 23, Dawes did appear before the court to answer to the contempt citation, on February 28. He was sent by the trial judge to the State's Attorney's office and the receptionist sent him to the Public Defender's office. The Public Defender, who represented the defendant, took a sworn statement from Dawes but made no effort to produce him in court for any hearing. The record further shows that the contempt citation was quashed by the judge upon motion of the Public Defender. The statement given to the Public Defender by Dawes was to the effect that Dawes, the defendant and Perry had committed several burglaries prior to September 4. It also states that the burglary on September 4 was a "set-up" by the Highland Park police to catch the defendant in a crime in Highland Park. Defendant moved the court to reconsider its judgment

on the basis of this statement being newly discovered evidence and upon the basis of this motion being denied, the defendant prosecuted this appeal on the ground he was entrapped by the police.

The law of entrapment, as set out in the statute above referred to, has been considered and analyzed by the Illinois courts in a long line of cases with various results, depending on whether the factual situations involved appeared to the court to fall within or without the intent of the statute. While the statute does not set up the standard of conduct which amounts to entrapment, the Illinois cases have consistently stated, with regard to entrapment that where "... it appears that officers of the law or their agents incited, induced, instigated or lured the accused into committing an offense which he otherwise would not have committed and had no intention of committing, and if a criminal design or intent to commit the offense originates in the mind of one who seeks to entrap the accused and who lures him into the commission merely for the purpose of arresting and prosecuting him, entrapment is established and no conviction may be had." People v. Strong (1961), 21 Ill. 2d 320, 324, 172 N.E. 2d 765, 767.

On the other hand, the Supreme Court in the case of People v. Wright (1963), 27 Ill. 2d 557, 558, stated:

"However, the defense of entrapment is not available to a person who has the intent and design to commit a criminal offense, merely because an officer, for the purpose of securing evidence, affords the person the opportunity to commit the criminal act, or purposely aids and encourages him in its perpetration. (People v. McSmith, 23 Ill. 2d 87.)"

The defendant cites several Illinois cases where entrapment was

held to be a valid defense, and contends the facts of his own case fall within the established principles of these cases. The four Illinois cases principally relied on by the defendant are People v. Strong, supra; People v. Jones (1966), 73 Ill. App. 2d 55, 219 N. E. 2d 12; People v. Rogers (1972), 6 Ill. App. 3d 1092, 286 N. E. 2d 365, and People v. Dollen (1972), 53 Ill. 2d 280, 290 N. E. 2d 879.

We have reviewed these cases carefully and find they are all cases involving the illegal sale of narcotics. While we agree with the legal principles set forth in those cases, we find the facts in each case to be so completely inapplicable to the case before us that it would serve no useful purpose and would only lengthen this opinion unnecessarily to consider them separately. In each of these cases, the first step in the crime, the placing of the defendant in possession of the narcotics, was arranged by the State through its agents and in some of these and other cases cited by the defendant compassion, or a special relationship, was exploited by the State. We do not quarrel with these decisions--they simply do not apply to the facts we are considering here. The case of Sherman v. United States, 356 US 369, 2 L.ed.2d 848, 78 S Ct 819 (1958), is of interest from the broad viewpoint of the origin and intent of the law of entrapment generally. However, the actual decision, which involved the entrapment of a narcotics user by another addict by playing upon his sympathies, does not help the defendant here, not only because of inherent differences between a narcotics case and one of burglary, but also because the defendant in that case was, to some extent, a victim of the crime, whereas the defendant in this case at bar can elicit no such consideration.



We believe it unnecessary to review the cases cited by the prosecution in detail. People v. Lewis (1963), 26 Ill. 2d 542, 187 N.E. 2d 700; People v. Hall (1962), 25 Ill. 2d 297, 185 N.E. 2d 143; People v. Outten (1958), 13 Ill. 2d 21, 147 N.E. 2d 284, and People v. Gonzales (1970), 125 Ill. App. 2d 225, 260 N.E. 2d 234, were all narcotics cases and in each case the court found the circumstances fell outside the intent of the entrapment statute. In each case the court was satisfied that the accused was neither an innocent dupe nor induced to do something which he would not have done except for the instigation of an agent or informer. In such cases, obviously, it makes no difference that the informer did not take the stand, since the established facts do not, of themselves, constitute a case of entrapment.

In the instant case entrapment is not established by the evidence. It is plain that the defendant merely did on this particular night what he had recently done before on other evenings and the mere fact that the informer and accomplice, Dawes, suggested the particular time and place for the burglary, or even that he did so in order to assist the police in detecting the defendant, are not sufficient facts to establish entrapment under the Illinois cases.

Actually, the only facts in the record suggesting entrapment are (1) the proximity in time of the questioning of the informer Dawes and the burglary in question, and (2) the evident communication between Dawes and the police during the hours just preceding the burglary. While these facts suggest cooperation between the informer and the police, they do not, by any means, establish entrapment. The police officers testified



that they did not know which station would be "hit" until late that evening and according to their testimony they merely knew that a burglary was imminent, not that they arranged one. In any event, the evidence in the record is not sufficient to link the police with the particular crime in question by establishing even the first necessary criterion of entrapment, that is, the instigation or arrangement of the particular crime. At most there is only a plausible inference in this regard. Under the Illinois cases mere knowledge, gained from cooperation between the informer and the police, is not a sufficient basis for a holding of entrapment, especially where the crime involved was one of a series of similar crimes defendant had recently been involved in and the relationship between the informer and the defendant was not one to create any influence or pressure on the defendant.

The failure of the prosecution to call the informer as a witness does not of itself establish entrapment. The State is not obliged to call the informer (People v. Aldridge (1960), 19 Ill. 2d 176, 166 N. E. 2d 563) and the failure to do so is evidentiary only, in creating an inference against the State. In the Strong and Jones cases, *supra*, the failure to call the informer did not of itself establish entrapment, it merely established the probable truth of the circumstances as told by the defendant, which circumstances, if believed, did establish entrapment. The defendant testified in his own behalf and his testimony was that when Dawes first suggested burglarizing a gas station he rejected the idea, but after riding around for awhile and thinking about it, he decided he would do it. It may have been true that the specific station



was suggested by Dawes, but this does not establish that the defendant was entrapped into doing something he would not otherwise have done. It is apparent he was readily amenable to the suggestion of Dawes and the casual way he approached the burglary as reflected by his own testimony, indicated it was a familiar pattern. The distinction must be drawn between the inducement of an otherwise innocent person and the apprehension, through lawful artifice of an individual already engaged in criminal activity. (People v. Strong, supra.) In making this determination the court should consider not only the conduct of the law enforcement officials, but also that of the defendant, including evidence of predisposition to commit the crime involved. People v. Lewis, supra.

We hold that on the basis of this record. the defendant has not established the defense of entrapment and that the trial court did not err in denying defendant's motion for a new trial and the judgment of the trial court is affirmed.

Judgment affirmed.

THOMAS J. MORAN, P.J. and GUILD, J., concur.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 17th Judicial
WILLIAM VRONCH,	)	Circuit, Winnebago County,
	)	Illinois.
Defendant-Appellant.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant appeals from a conviction for forgery for which he was sentenced to a term of not less than 1 nor more than 3 years in the penitentiary.

The conviction is based on defendant's plea of guilty. The defendant contends: 1) He was not properly advised of his rights when he waived his right to indictment by the grand jury; 2) He was not properly admonished and advised prior to his plea of guilty; 3) The court considered improper matters and allegations in denying probation and imposing sentence on the defendant, and 4) The plea negotiation was not timely disclosed to the court, to defendant's prejudice.

The record discloses that the defendant, with intent to defraud, cashed a stolen and forged check and accepted money therefor. At his arraignment the defendant pleaded not guilty and waived his right to indictment by the grand jury. At the hearing on the waiver of the grand jury, April 28, 1972, the trial judge, in practical terms, ex-



plained to the defendant, who was represented by privately retained counsel, his right to be prosecuted by indictment, the nature of the grand jury proceeding he was waiving, the nature of the offense he was charged with, and the penalty therefor. He also read the information to the defendant including a description of what defendant was charged with doing. He then asked the defendant if, knowing those facts, the defendant wished to waive the grand jury and be prosecuted by information, to which the defendant answered, "Yes".

It seems clear from the record that the defendant has no justifiable complaint on the question raised as to the waiver of the grand jury. The trial judge adequately explained to him what he was waiving and the defendant asked no questions but indicated he did understand and wished to waive this right. We believe the trial court's remarks on this point substantially complied with the intent of Supreme Court Rule 401 (b). (Ill. Rev. Stat. 1971, ch. 110 A, par. 401 (b); People v. Trenter (1972), 3 Ill. App. 3d 889, 279 N. E. 2d 130; People v. Wilson (1971), 132 Ill. App. 2d 537, 270 N. E. 2d 88; People v. Mace (1967), 79 Ill. App. 2d 422, 223 N. E. 2d 725.

Subsequently, on May 24, 1972, the defendant appeared with his counsel and moved to change his plea from not guilty to guilty. Before accepting the defendant's plea of guilty the court advised the defendant and his private counsel of his right to a trial by jury; his right to confront the witnesses against him, and that in pleading guilty he waived a trial and left it up to the court alone. The court also explained the penalty for conviction of forgery. The defendant's



statement to the police was exhibited in court and was acknowledged by the defendant as being correct and having been given voluntarily. The Assistant State's Attorney explained to the court that checks were stolen; that one of these checks in the amount of \$150 was cashed at the Prairie Moon Tavern; that following his arrest, defendant admitted to the police he knew the checks were stolen and that he had cashed the check and split the proceeds with other parties. The court then accepted the defendant's plea of guilty. The State's Attorney mentioned that the defendant had also been charged with a burglary although no indictment had been returned nor any information filed against him for that crime. He then stated, "The only plea negotiation I have with Mr. Nicolosi (defendant's attorney) would be that I would dismiss that, for his plea of guilty here." To this the court replied, "All right." This was the only discussion the record discloses on the question of plea negotiation.

The defendant also contends that he was not properly admonished by the trial court prior to entering his plea of guilty as to the nature of the charge, the maximum and minimum sentence, and that if he pleaded guilty there would not be a trial of any kind.

The record does not support these contentions. The defendant is not shown as being of less than average intelligence, he had the information before him, he was confronted with his own statement to the police in open court before his plea of guilty, and there is no ground for believing he did not understand the nature of the charge against him. The court specifically advised him of the maximum and



minimum sentence he would receive. As to the contention that he did not understand there would not be a trial of any kind if he pleaded guilty, the record shows that the court told the defendant, "Where you plead guilty you waive your right to trial by jury and the matter is then left up to the Court alone." We believe these words were sufficient to inform the defendant that the court would dispose of the case without a trial. In any event we cannot conceive that the defendant expected a bench trial or that he was prejudiced by the court's remarks above quoted. We believe on the basis of the record there was substantial compliance with Supreme Court Rule 402 (a) and (b) (Ill. Rev. Stat. 1971, ch. 110 A, par. 402 (a) and (b)) sufficient to safeguard the defendant's rights. In the recent case of People v. Krassel (1973), 12 Ill. App. 3d 64, where the defendant raised similar contentions, after a plea of guilty, the court said, p. 66:

"... Defendant contends, however, that the trial court erred by not admonishing him that if he pleaded guilty there would not be a trial of any kind, that he would not be confronted with the witnesses against him and further that the court did not inquire whether, apart from the plea agreement, there was any force or threats used to obtain the plea.

"Supreme Court Rule 402 does not require strict literal adherence to every word contained in it, but rather requires only substantial compliance sufficient to safeguard the rights of the accused. (People v. Reed, 3 Ill. App. 3d 293, 278 N.E. 2d 524.)"

As part of the opinion the Court in Krassel, supra, p. 66, cited the Supreme Court case of People v. Mendoza (1967), 48 Ill. 2d 371, 270 N.E. 2d 30, as follows:



"The fact that defendant was not specifically admonished by the court, on the record, as to each and every consequence of his plea does not sufficiently demonstrate that he was, in fact, unaware of these consequences. At the time defendant entered his plea he was represented by privately retained counsel and it is not alleged that his counsel failed to adequately advise him of the consequences of a guilty plea. '"

We quote the above as indicating that where there is substantial compliance with Rule 402 and there is nothing to indicate the defendant was misled, deceived or prejudiced by the absence of some detail suggested by the rule, the trial court's judgment should not be disturbed. In the instant case there is nothing in the record to raise a substantial doubt about the defendant's understanding and acceptance of the consequences of his plea. Where the record fails to disclose any irregularity or omission which could logically have misled or prejudiced the defendant and there is evidence of substantial compliance, a technical insufficiency in complying with Rule 402 is not ground for reversal. People v. Wilson, supra; People v. Shepard (1973), 10 Ill. App. 3d 739, 295 N. E. 2d 310; People v. Walsh (1972), 3 Ill. App. 3d 1042, 279 N. E. 2d 739; People v. Abel (1973), 10 Ill. App. 3d 210, 291 N. E. 2d 841; People v. Anderson (1973), 10 Ill. App. 3d 558, 294 N. E. 2d 763; People v. Williams (1974), 16 Ill. App. 3d 199 (2d Dist.); People v. Compton (1974), 16 Ill. App. 3d 196 .

The defendant further contends that the court "did not receive sufficient information or answers from the defendant to determine that defendant's plea was voluntary." The defendant does not contend that his plea was not voluntary or that promises, threats or coercion were used to secure it, or even that he at any time, after entering his plea of guilty,



contemplated changing his plea or had any reason to do so. In open court, in the presence of his own private counsel, the defendant acknowledged that he had signed the statement admitting his guilt and that the statement was accurate and was freely and voluntarily given. The defendant was no stranger to legal procedure, having been previously tried and convicted of robbery, for which he served a prison sentence. The totality of the circumstances here, the presence in open court of the defendant / with his private counsel, the affirmative answers to the question whether the statement admitting guilt was freely and voluntarily given, the previous experience in criminal procedure to which the defendant had been exposed, and the acknowledgment of the plea bargain by the court and the defendant's attorney, taken together, repudiate any suggestion of coercion or misunderstanding as to the plea of guilty having been given voluntarily.

The fact that the court did not in so many words inquire of the defendant if his plea of guilty was voluntary and not coerced seems irrelevant in view of all the attending circumstances. The court is required by Rule 402 (b) to "determine" whether the plea is voluntary before accepting it. The facts attending the plea could hardly lead to any other determination by the court than that the plea was voluntary. The plea bargain, again, confirms the voluntariness of the plea. It was apparently favorable to the defendant and hence would logically seem to have been given without coercion. A plea agreement stated in open court and accepted by the court in the presence of the defendant's personal attorney, which is favorable to the defendant, can certainly be assumed by the court to have been given "without any threats or



promises apart from the plea agreement." We think, therefore, that this contention is purely technical and it is a shadow without substance and its only effect is to obscure rather than to illuminate the record. The court substantially complied with the requirements of Rule 402 in its acceptance of the guilty plea as being voluntarily and knowingly made. People v. Ellis (1974), 16 Ill. App. 3d 306 N.E.2d 53 282, / (2d Dist.); People v. Campbell (1973), 13 Ill. App. 3d 237, 300 N.E. 2d 568; People v. Compton, supra; People v. Shepard, supra.

In the hearing on probation a comment was made by the court as to a burglary offense which the defendant contends was prejudicial and may have resulted in his application for probation being denied and defendant makes this another ground for his appeal. The record reveals no evidence which would indicate confusion in the judge's mind and we will not assume that such confusion in fact existed. Based on the probation report and the information brought out at the probation hearing, we believe the judge was justified in accepting the probation officer's recommendation and in denying probation.

Finally, the defendant raises a contention regarding the timeliness of the disclosure to the court as to a plea negotiation. The record satisfies us that the defendant was not prejudiced in this respect. He was represented by counsel and as appears from the record the judge openly concurred in the agreement which was suggested. Neither defendant or his counsel made any comment indicating dissatisfaction or lack of understanding with regard to the plea negotiations. We do not consider this to be a point of any substance.



We find no error requiring reversal and the judgment is affirmed.

Judgment affirmed.

THOMAS J. MORAN, P. J., and GUILD, J., concur.

No. 72-191

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	}	
Plaintiff-Appellee,		Appeal from the Circuit Court of
		St. Clair County.
vs.		
LAWRENCE B. DRISDEL,	}	
Defendant-Appellant.		Honorable James W. Gray, Judge Presiding.

PER CURIAM:

The appellant was indicted for the offense of armed robbery on three counts. After originally pleading not guilty, the appellant pled guilty to the reduced charge of robbery and was sentenced pursuant to a plea agreement of one to three years in the penitentiary. Drisdell was paroled on June 2, 1972, and he asks that his conviction be reversed because the trial court failed to comply with Supreme Court Rule 402(a)(1), (a)(2) and (b).

Supreme Court Rule 402(a)(1) requires the trial court, before accepting the defendant's guilty plea, to determine that the defendant understands the nature of the charge. The defendant was provided a copy of the armed robbery indictment at the arraignment on April 16, 1971. The record indicates that the indictment was not read or explained to him at that time. The defendant had retained counsel, but counsel did not appear at the arraignment. At the proceedings on October 27, 1971, over six months after the arraignment, the charge was reduced to robbery, and defendant was represented by his counsel. The State's assertion that Rule 402(a)(1) was complied with rests upon the following excerpt from the record:

The Court: In entering a plea of guilty there must be a factual basis. Do you have anything to say?

State's Attorney: The State would be prepared to show on the 18th day of January, of this year, there was a business known as the Beef and Bun Restaurant, at 2100 State Street in East St. Louis. On that day, Delphia Jordan was a waitress on these premises and the defendant entered and robbed her of an indeterminate

amount of money; the sum of money; she was not certain of the exact amount and so it was alleged in the indictment, an indeterminate amount.

The Court: You understand the statement of the State's Attorney? It is clear what you have been charged with?

The Defendant: I understand.

The Court: On entering a plea do you, in fact, understand you are admitting your participation in this crime?

The Defendant: Yes.

The Plaintiff-Appellee cites People v. Wintersmith, 1972, 9 Ill. App.3d 327, 292 N.E.2d 220; People v. Tennyson, 1972, 9 Ill.App.3d 329, 292 N.E.2d 223; and People v. Wright, 1971, 2 Ill.App.2d 304, 275 N.E. 2d 735 for the proposition that the above colloquy was sufficient to advise the defendant of the nature of the charge. In Wintersmith and Tennyson the Appellate Court for the First District, Fourth Division held that Rule 402(a)(1) is complied with merely by the admonishment of the crime by name. In Wintersmith the Court stated:

The rule that a defendant must be informed of the nature of the charge does not require the court to recite all the facts therein. The admonishment of the crime by name has been held sufficient to apprise the defendant of the nature of the crime charged. (292 N.E.2d at 222)

In People v. Wright, the Appellate Court for the First District, First Division found compliance with Rule 402(a)(1) because the defendant had been given a copy of the indictment which clearly explained what was charged and because the court specifically referred to the crime by name.

The court addressed the defendant personally in open court after the prosecution narrated the facts of the crime that the defendant was charged with, and we are satisfied that the defendant understood the nature of the charge. There is no doubt that his rights were secured by this proceeding and he was well aware of the consequences of his conduct. The trial judge does not need to "parrot a number of specifically prescribed formal phrases that would render these constitutional guarantees counter-productive and put in jeopardy the very values they were meant to preserve." (People v. Anderson, 1973, 10 Ill.App.3d 558)

The trial court's statement that, "The maximum provided by law is one to three years" was an incorrect statement of the law. This error is inoffensive, since it was an understatement rather than an overstatement of the possible maximum penalty.

The questions to the defendant by the court and the answers by the defendant dispel any notion that the plea of guilty by the defendant was anything but given of his own free will and volition. Thus, Supreme Court Rule 402(b) "Determining Whether the Plea Is Voluntary" was observed.

The final point raised by the defendant was that Rule 401(b) was not complied with because the entire plea agreement was not stated in court before the plea was accepted. Defendant was to receive some time before being imprisoned to take care of his family. The Judge gave him one week. This is a part of the agreement and the defendant does not appear to have been prejudiced by the fact that the entire plea was not stated immediately.

The judgment of the Circuit Court of St. Clair County is affirmed.

Crebs, J., not participating.

PUBLISH ABSTRACT ONLY

17

17 I.A. 923

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12427

Agenda 74-37

HARRY KAISERMAN,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
GOLDYE COHN ELLENSON,	)	Sanngamon County
	)	603-72
Defendant-Appellant.)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

The defendant appeals from that portion of an order of distribution in a partition proceeding that apportioned plaintiff's attorney fees among the parties in interest. The defendant contends that the complaint did not join certain parties which she asserts were necessary parties and further that she interposed a good and substantial defense and found it necessary to employ her own counsel. This she contends precludes apportionment of attorney fees. No issue is raised as to the reasonableness of the fees. We affirm.

The relevant statute provides:

"Apportionment of costs.] § 25. In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the complaint, the court shall apportion the costs among the parties in interest in the suit, including the necessary expense of procuring such evidence of title to the real estate as is usual and customary

for making sales of real estate, and a reasonable fee for plaintiff's solicitor, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some of them, shall interpose a good and substantial defense to the complaint. In such case the party or parties making such substantial defense shall recover their costs against the plaintiff according to equity." (Ill.Rev.Stat., 1971, ch. 106, § 68.)

Initially, by her answer, defendant admitted that the interests were as alleged in the complaint for partition. By an amended answer, however, she asserted that certain trust beneficiaries were necessary parties. In her reply brief, defendant asserts that even though she did not prevail upon the "necessary party" issue in the trial court, the mere assertion of the issue, if in good faith, should operate to prohibit the apportionment of costs.

The fact that neither trust beneficiaries, their spouses, nor the spouses of the tenants in common, were not named as defendant, does not mean that "the rights and interests of all the parties in interest" were not properly set forth in the complaint. The instrument creating the trust here involved gave the defendant, as trustee, power to sell, public or private sale, or partition. Furthermore, as stated in I.L.P. Partition § 33, the wives of tenants in common are not necessary parties; neither is one whose interests are adequately represented by a trustee a necessary party. In Scott v. Scott, 307 Ill. 586, 139 N.E. 70, the court noted specifically that beneficiaries of a trust were represented in the partition proceeding by the trustee and need not be made parties to the suit in person.

While it is true that any asserted defense need not necessarily be a successful defense in order to preclude apportionment

of costs under the quoted statutory provision, that which is asserted must be a good and substantial defense. In this case, the trial court determined that the purported defense was not a substantial defense and we certainly are not prepared to say that such finding is against the manifest weight of the evidence. We have discussed the interpretation of the foregoing statutory provision, the cases under it, and the issues for review, in the opinion of Lane v. Lane (4th Dist.Appell. Ct.(1974) General No. 12099), Ill.App.3d , N.E.2d , filed contemporaneously with this opinion. For reasons above indicated, the judgment of the circuit court of Sangamon County be and the same is affirmed.

AFFIRMED.

SMITH, P.J., TRAPP, J., concur.

17
No. 72-135

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

3D
17 I.A. 925
FILED
MAR 15 1974

W. B. Smith
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
ex rel. RALPH BOTTOMS,)	Appeal from the Circuit Court of
)	Randolph County.
Petitioner-Appellant,)	
-vs-)	
)	
ELZA BRANTLEY, Warden, Menard)	
Branch, Illinois State Penitentiary,)	Honorable Carl H. Becker,
)	Judge Presiding.
Respondent-Appellee.)	

PER CURIAM:

Appellant was convicted upon his plea of guilty to an information charging theft over \$150 in Stephenson County. He subsequently filed a petition for a writ of habeas corpus in Randolph County, alleging that the trial court did not properly accept his waiver of indictment. He appeals from an order dismissing the petition without hearing, asserting as additional error the court's failure to appoint counsel to prosecute the petition. The State Appellate Defender, Fifth District Office, counsel on appeal, has filed a motion to withdraw as counsel pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Proper service has been shown and the court has given appellant adequate time to raise any points that he chooses. Appellant has not responded.

Our consideration of the record reveals no error of a stature appropriate for habeas corpus relief. Further, since habeas corpus is civil in nature (Ill. Rev. Stat. ch. 65, section 32), appointment of counsel was not required. No other error has been discovered.

We therefore grant the motion to withdraw and affirm the judgment of the circuit court of Randolph County.

Motion allowed, judgment affirmed.

Carter, J., did not participate.

No. 73-219

No. 73-220

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
MAR 15 1974

Walter T. Williams
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Madison County.
vs.)	
)	
HERSHALL DAVIS,	)	Honorable John Gitchoff,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

Appellant was convicted in Madison County of three counts of armed robbery upon his plea of guilty to two separate indictments. His appeals from the convictions on the two indictments were consolidated by this court. Appointed counsel on appeal, the Illinois Appellate Defender Project, moved for permission to withdraw, and filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, setting forth all possible issues on appeal and demonstrating the lack of merit of each.

The record discloses that the indictments properly charged the offenses, and that Supreme Court Rules 401 (Ill.Rev.Stat. ch. 110A, par. 401), providing standards for acceptance of waiver of counsel, and 402 (Ill.Rev.Stat. ch. 110A, par. 402), providing standards for acceptance of pleas of guilty, were properly complied with.

Appellant was sentenced to from four to five years imprisonment on each offense, the sentences to run concurrently. This sentence comports with chapter 38, section 1005-8-1, and section 1005-8-4, Ill.Rev.Stat.

As required by Anders, the Illinois Defender Project has served notice on the appellant of the motion to withdraw. Furthermore, this court has notified appellant of its consideration of the motion and allowed appellant time in which to file briefs or objections pro se. No response has been received.

The motion of the Illinois Defender Project to be allowed to withdraw as counsel is granted, and the conviction affirmed.

JUDGMENT AFFIRMED.

Justice Carter not participating.

PUBLISH ABSTRACT ONLY.

NO. 72-212

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Fifteenth
v.	)	Judicial Circuit, Carroll
	)	County, Illinois.
HERBERT C. PETERSEN,)	
)	
Defendant-Appellant.)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

After a bench trial, defendant, aged 71, was found guilty of driving under the influence of intoxicating liquor and fined \$300 plus costs.

For the purpose of this appeal, we find it necessary to consider only the question of whether defendant was deprived of his right to a jury trial.

On February 16, 1972, the date set for trial, a hearing was had on defendant's motion to suppress certain evidence. Upon conclusion of the hearing and denial of the motion, a five minute recess was taken. When the court reconvened, the report of proceedings reveals the following query:

"Court: Are we ready to proceed to trial now?

Mr. Golden: Yes, Your Honor.

Mr. Finer: Yes, Your Honor. "

Trial then commenced without a jury and the defendant was found guilty. A post-trial motion for a new trial, raising the question before us, was denied.

It is the State's position that defendant and his privately-retained counsel were both aware that the trial of the cause was to proceed immediately upon conclusion of the hearing on defendant's motion to suppress. It is argued that this knowledge, taken together with the fact that defendant offered no objection, constituted sufficient basis for us to presume that the defendant knowingly and understandingly waived his right to trial by jury.

The method of trial in criminal cases is governed by statute and all prosecutions, except on a plea of guilty, shall be tried by the court and jury unless the jury is waived by the defendant in open court.[Ill. Rev. Stat. 1971, ch. 38, §115-1.] The provision applies equally to misdemeanors. [People v. Woerly, 50 Ill.2d 327 (1972).] It is well settled that the trial court has a duty to ascertain that a waiver of jury is expressly and understandingly made by the defendant, [People v. Wesley, 30 Ill. 2d 131, 133 (1964)], and that presumption of such waiver from a silent record is impermissible. People v. Rosen, 128 Ill. App. 2d 82 (1970); People v. Rambo, 123 Ill. App. 2d 299 (1970).

Except for the post trial motion, the record in the case at bench does not contain the word "jury." Consequently, we decline to accept the State's presumption and reverse and remand this cause for a new trial.

Reversed and Remanded.

GUILD, P.J. and SEIDENFELD, J. - Concur .

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the 17th Judi-
v.	)	cial Circuit, Winnebago
	)	County, Illinois.
DONALD R. ARBUCKLE,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant, Donald R. Arbuckle, was convicted of statutory rape upon his plea of guilty on February 21, 1958, and sentenced to life imprisonment. On July 31, 1959, defendant filed a pro se petition for relief under the post-conviction act then in effect (Ill.Rev.Stat. 1959, ch. 38, par. 826) which the court denied without an evidentiary hearing. Defendant appealed to the Illinois Supreme Court which affirmed the trial court in People v. Arbuckle (1969), 42 Ill.2d 177.

On November 10, 1971, defendant again filed a pro se petition entitled "Petition for a Writ of Post-Conviction". In the petition defendant restates the facts which appear in the Supreme Court Opinion (see 42 Ill.2d 177, 178-179) and contends on several grounds that his sentence amounted to cruel and inhuman punishment. (Defendant also prays for a writ of habeas corpus but it is conceded by the State and defense counsel that the matter before us does not involve habeas corpus.) The trial court appointed counsel,

treated the defendant's pleading as one for "Writ of Habeas Corpus and Petition for Post-Conviction Hearing", and denied the motion and petition as being res judicata.

The defendant appeals, contending that res judicata principles do not apply because defendant was not represented by counsel in the initial petition filed in 1959, although he had requested counsel. Defendant also argues alternatively that the sentence should be modified or the case remanded for a sentencing hearing applying principles of indeterminacy.

We conclude that the trial court properly denied the defendant's petition without an evidentiary hearing. Treating the petition as a request for post-conviction relief (Ill.Rev.Stat. 1969, ch. 38, pars. 1-2 et seq.), the only issue raised is that life imprisonment for statutory rape is constitutionally impermissible as constituting cruel and inhuman punishment. This was considered by the court in People v. Arbuckle, 42 Ill.2d 177, on defendant's contention there that he was subjected to cruel and unusual punishment (see page 179 of the opinion). The court concluded after examining all of the various allegations of constitutional error that there was no substantial showing of any violation of defendant's constitutional rights (page 182).

The allegations now made by defendant challenge the sentence on essentially two grounds. Defendant contends that the Parole Board has arbitrarily "re-sentenced" him each time he appeared before it, to another one year term. He apparently reasons that when he became eligible for parole, he had served his life sentence and that further incarceration amounted to cruel and inhuman punishment. No authority is cited for this novel contention and we find no merit in the argument.

Defendant also contends that his original sentence was unconstitutional since the statute under which he had been sentenced

was later replaced before his petition was filed by the statute defining the offense of indecent liberties with a child, carrying a maximum sentence of 20 years (Ill.Rev.Stat. 1967, ch. 38, par. 11-4). Principles of res judicata, however, bar the relitigation of the constitutionality of the life sentence. See People v. Derengowski (1970), 44 Ill.2d 476, 480; People v. Turner (1970), 47 Ill. 2d 7, 9.

Defendant's argument that the failure to appoint counsel for him on his request in connection with the first post-conviction petition in 1959 is an error of constitutional magnitude and one which was not referred to or disposed of in People v. Arbuckle, 42 Ill.2d 177, is not persuasive. First, it is difficult to see how defendant can claim prejudice by lack of trial counsel on his first post-conviction petition since he was represented by counsel in the appeal and since the Supreme Court did pass on the single constitutional issue of cruel and inhuman punishment which defendant now seeks to raise a second time. Also, appellate counsel in the earlier appeal could have raised the issue of the failure to appoint trial counsel and in failing to do so waived the question. See People v. Collins (1968), 39 Ill.2d 286, 289.

Neither People v. Nichols (1972), 51 Ill.2d 244, nor People v. Polansky (1968), 39 Ill.2d 84, cited by defendant as analogous authority, support defendant's claim that fundamental fairness requires that he be allowed a further hearing at which all claims which may be noted by competent counsel may be considered. In each of the cited cases the defendant failed to invoke appellate procedures because counsel was not provided, and it was therefore deemed fundamentally unfair to deny a petition because of procedural failures in the absence of counsel which would have otherwise permitted the bar of the statute of limitations. Here defendant has

had his appeal from the denial of his initial petition with the aid of appellate counsel. He thus has had one complete opportunity to show substantial denial of his constitutional rights and is not entitled to another under the circumstances shown.

Defendant's contention that his sentence is excessive does not present a claim of deprivation of substantial constitutional rights and is therefore not properly before us in a review of post-conviction proceedings. The life sentence was not illegal when given (cf. People v. Whittington (1970), 46 Ill.2d 405; People v. Russo (1972), 52 Ill.2d 425; People v. Cox (1972), 53 Ill.2d 101). The sentence of life imprisonment was within applicable statutory limits when imposed (Ill.Rev.Stat. 1957, ch. 38, par. 490), and is not violative of the constitutional proscription against cruel and unusual punishment. (See People v. Dolgin (1955), 6 Ill.2d 109, 112; People v. Jackson (1969), 116 Ill. App.2d 304, 321-322.) The fact that the statutory law has subsequently been changed to require that indeterminacy principles are to guide sentencing does not affect the constitutional basis of defendant's life sentence. People v. Shaw (1971), 49 Ill.2d 309, 311.

The judgment below is affirmed.

GUILD, J. and RECHENMACHER, J. concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
1971 OCT 14
Abstract
171A.933^{3D}

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) Appeal from the Circuit
) Court for the 17th Judi-
v.) cial Circuit, Winnebago
) County, Illinois.
LEE ARTHUR FRICKS,)
)
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Lee Arthur Fricks, age 19, pled guilty to an information charging him with burglary. The court entered a judgment of conviction on his plea and sentenced him to 2-5 years in the penitentiary. Defendant appeals, contending that the court committed reversible error by failing to inquire into the voluntariness of defendant's guilty plea pursuant to Supreme Court Rule 402(b) (Ill.Rev.Stat. 1971, ch. 110A, par. 402(b)). He alternatively claims that his sentence is excessive; and that it should be vacated and reduced or the cause remanded with instructions to conduct a hearing in aggravation and mitigation for the purpose of resentencing.

From our review of the record we are satisfied that there was substantial compliance with Supreme Court Rule 402. The transcript of the guilty plea hearing shows that defendant was advised of his right to a trial by jury, his right to confront witnesses against him, his right to cross-examine these witnesses, his right to put

on a defense, his right to have a jury pass upon his guilt or innocence, and the minimum and maximum sentence he could receive. The court then inquired into the factual basis of the plea and was advised on the record of the details of the breaking into the victim's home, the theft of items in the home, and the written statement given by defendant admitting the entering and the theft. The statement was placed in evidence at the hearing and the court asked the defendant if the facts stated were correct. The defendant answered "Yes". The court then accepted the plea.

It also appears from the record that defendant was admitted to bond prior to entering his guilty plea and that his bond was continued after the guilty plea pending the hearing on his motion for probation.

The defendant particularly claims that the record does not show compliance with sub-section (b) of Rule 402 which states that the court shall not accept a plea of guilty without first determining that the plea is voluntary; and also states that if the tendered plea is the result of a plea agreement, the agreement shall be stated in open court; and that the court by questioning the defendant personally in open court shall confirm the terms of the plea agreement or that there is no agreement, and shall determine whether any force or threats or any promises apart from the plea agreement were used to obtain the plea.

There is no indication in the record that any plea discussions took place. If there had been any suggestion of plea bargaining under Supreme Court Rule 402(b), it would then have been necessary to state the agreement and the court would be required to question the defendant to confirm its terms or to determine that there was no agreement in fact. The purpose of the rule is to give visibility to the plea agreement process to avoid the possibility that otherwise the defendant may feel required to state

falsely that no promises were made and the plea might then be subject to collateral attack. (Smith-Hurd Annotated, ch. 110A, par. 402, Committee Comments.) We do not interpret the rule to require that the court must make these inquiries when there is no suggestion that any plea discussions are involved.

Supreme Court Rule 402(b) directs that the court, of course, shall not accept a guilty plea without first determining that the plea is voluntary. There is no requirement in the rule that this determination may only be made by asking the defendant whether any promises or threats have been made, or by using any particular phrases, although it should be considered the better practice to directly inquire as to the existence of any promises or threats. People v. Krassel (1973), 12 Ill.App.3d 64; People v. Shepard (1973), 10 Ill.App.3d 739.

Here the judge could well have made his determination, implicit in his acceptance of the plea on the basis of the whole record that the plea was voluntary. The defendant was represented by counsel; the court very carefully advised the defendant of the various rights which he was giving up by entering his plea; the defendant confirmed his written confession admitting the details of the offense; the answers of the defendant were unequivocal; and the factual basis for the plea appears on the record. Defendant has made no suggestion either to the trial court or to this court that he did not, in fact, make a voluntary plea or that he was prejudiced by the lack of more specific questioning as to whether there were any promises or threats. (Cf. People v. Robinson (1972), 5 Ill.App.3d 1065 (Abst.) cited by defendant in which it was considered "significant, in light of defendant's allegation that his plea was coerced, that he was not asked if his plea was voluntary or the result of any threat or promise.") The fact that Supreme Court Rule 402 has not been technically complied with does

not demonstrate that the plea has not been voluntarily and understandingly made if there is an adequate record to assure that the guilty plea was voluntarily and understandingly entered. (See People v. Mendoza (1971), 48 Ill.2d 371, 374; People v. Williams (1973), 16 Ill.App.3d 199, 203; People v. Ellis (1974), 16 Ill.App.3d 282, 286-287; People v. Anderson (1973), 10 Ill.App.3d 558, 563-4.) We find substantial compliance with Supreme Court Rule 402(b) in the record before us.

The State has conceded that the sentence of 2-5 years offends provisions of indeterminacy under the Unified Code of Corrections which classifies burglary as a Class 2 felony (Ill.Rev.Stat. 1972 Supp., ch. 38, par. 19-1(b); and par. 1005-8-1(c)(3)). We therefore modify defendant's sentence to a minimum term of 1 year and 8 months and a maximum of 5 years. See People v. Harvey (1973), 53 Ill.2d 585.

As modified, the judgment below is affirmed.

Affirmed as modified.

GUILD, J. and RECHENMACHER, J. concur.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
MAY 19 1974
J. L. Carter
CLERK OF COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Appellee,	)	Appeal from the Circuit Court of
	)	Jefferson County.
vs.)	
)	
RAYMOND G. CAPPS,	)	Honorable Alvin Lacy Williams,
	)	Judge Presiding.
Appellant.)	

PER CURIAM:

Appellant was convicted of robbery upon his plea of guilty in Jefferson County. Following a hearing in aggravation and mitigation, he was sentenced to from three to six years imprisonment. Subsequently, on September 14, 1973, an Order was entered by this court reducing the minimum sentence to two years in compliance with chapter 38, section 1005-8-1(c)(3), Ill.Rev.Stat. Appellate counsel now moves to withdraw pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Appellant was served by counsel with the motion and was notified of the proceedings by this court and given ample time to file prose briefs or other documents raising issues to be considered in this appeal. No response was received.

We have reviewed the record and found no error. Appellant was properly indicted and arraigned. The trial court complied in all respect with Supreme Court Rule 402(Ill.Rev.Stat. ch. 110A, par. 402) in the acceptance of the guilty plea. We therefore allow the motion to withdraw and affirm the judgment and sentence of the circuit court as modified by prior order of this court.

Motion allowed; Judgment affirmed as Modified.

Justice Carter not participating.

Publish Abstract Only.

FILED

MAR 25 1974

No. 72-361

LOREN J. SLOVITZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
KEITH A. NEWCOMER,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court for the 16th Judi-
cial Circuit, Kane
County, Illinois.

171A.995^{3D}

17

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant was convicted upon his plea of guilty to an indictment charging him with aiding and abetting a burglary (Ill.Rev. Stat. 1971, ch. 38, par. 19-1) and sentenced to 3-10 years in the penitentiary. He has appealed, claiming that the court failed to admonish him concerning the waiver of his right to a jury trial, his right to confront witnesses, and his right to plead and persist in the plea of not guilty. Alternatively, he contends that the sentence is improper and excessive and should be reduced.

The record reveals that the Public Defender advised the court at the beginning of the change of plea hearing that defendant wished to withdraw his plea of not guilty, waive his right to a trial by jury and to plead guilty to the offense charged. The court then asked the 18 year old defendant a number of questions directed to his capacity to understand the proceedings. The court asked the defendant whether his counsel had told him he was entitled to a jury trial or to a trial before a judge, to which

the defendant responded affirmatively. The court told the defendant that once he entered a plea he was giving up the right to call witnesses in his own defense, that he was giving up the presumption of innocence and admitting his guilt, all of which the defendant acknowledged. The record further shows that the court determined that there was a factual basis for the plea, and that defendant was advised of the nature of the offense together with the possible penalty. The court also asked the defendant whether he was signing the written plea of guilty freely and voluntarily to which defendant responded that he was.

It thus appears that Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402) was fully complied with except for an inquiry into whether defendant knew that by pleading guilty he was giving up the right to confront witnesses against him. We conclude, however, that on the whole record there has been substantial compliance with the rule and that the court did not commit reversible error in accepting the guilty plea. People v. Mendoza (1971), 48 Ill.2d 371, 373-4; People v. Krouse (1972), 7 Ill.App.3d 754, 757. See also People v. Williams (1973), 16 Ill.App.3d 199, 202; and People v. Ellis (1974), 16 Ill.App.3d 282, 286.

Defendant next contends that the court imposed an excessive sentence because it considered evidence of other offenses which were not reduced to conviction. There is no evidence that the court was influenced by matters which it did not have a right to consider in imposing sentence. It appears from the record of the hearing in aggravation and mitigation that the court was advised that the defendant was implicated in burglaries and other offenses which had come to the State's attention after the plea. The defendant, through his counsel, was given the opportunity to include the charges in the hearing in aggravation. A continuance was

offered defendant but his counsel agreed to proceed without the delay. The defendant testified to the commission of another burglary and explained the other charges in an exculpatory manner, all without objection. The court acted properly. See People v. Adkins (1968), 41 Ill.2d 297, 300-302; People v. Fuca (1969), 43 Ill.2d 182, 186; People v. Bey (1972), 51 Ill.2d 262, 267-268.

People v. Hampton (1972), 5 Ill.App.3d 220 and People v. Riley (1941), 376 Ill. 364, cited by defendant, do not support his argument that evidence of criminal offenses without proof of conviction may not be considered in aggravation under the circumstances shown here. In Hampton the evidence of other criminal offenses was introduced at the hearing in aggravation and mitigation over repeated objections, while here there was no objection and the evident purpose was to avoid future prosecution. In Riley, moreover, a death sentence was affirmed because defendant did not object to or deny the evidence of other offenses not reduced to conviction.

Defendant also contends that his sentence should be reduced under the provisions of the Unified Code of Corrections (Ill.Rev. Stat. 1973, ch. 38, par. 1005-8-1). The sentence imposed of 3-10 years in the penitentiary complies with the new Code which classifies burglary as a Class 2 felony with a maximum term of 20 years and any term in excess of 1 year as a minimum. The provision that the minimum term shall be 1 year for a Class 2 felony unless the court having regard to the nature and circumstances of the offense and the history and character of the defendant sets a higher minimum term (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(c)(3)) does not require that the sentence be reduced or the cause remanded for a new sentencing hearing as requested by defendant. (C.f. People v. Fuller (1974), ____ Ill.App.3d ____ (2nd Dist.#72-310).) It is clear from the record that the trial court has already considered the nature and circumstances of the offense and the history and character of the defendant in setting a minimum

sentence of more than the 1 year period which was the minimum under the previous law (Ill.Rev.Stat. 1969, ch. 38, par. 19-1(b)) and has not violated the indeterminacy requirement of the new Code.

The judgment below is therefore affirmed.

Affirmed.

GUILD, J. and RECHENMACHER, J. concur.



No. 73-13

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Will County
)	
vs.)	
	)	Honorable
HENRY ZGLOBICKI,	)	Robert Higgins
	)	Presiding Judge.
Defendant-Appellant.)	

Mr. JUSTICE ALLOY delivered the opinion of the Court:

Abstract

This is an appeal from a conviction and sentence for the crime of Armed Robbery by defendant Henry Zglobicki, pursuant to which he was sentenced to a term of not less than five (5) nor more than six (6) years in the Illinois State Penitentiary. The cause was tried by a jury which returned a guilty verdict. On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt, and he also contends that the sentence imposed upon him is excessive under the Illinois Unified Code of Corrections (Ill. Rev. Stat., 1973, ch. 38 §1005-8-1(c)(2)).

It appears from the record that defendant came into a Gulf Service Station on Route 53, Romeoville, Illinois, as a passenger in an automobile driven by Carl Luszczak. It was shown that defendant exhibited a \$10 bill presumably with which to pay for the purchase of one dollar's worth of gasoline. When the station attendant, Mr. Shuman, attempted to make change for the \$10 bill, the co-defendant, Luszczak, demanded all of the money that Shuman had while pointing a small caliber

handgun at him. Following the completion of the robbery, Lusczak accompanied by defendant Zglobicki, left in the automobile and were apprehended by a Lockport city policeman in the same automobile within a short time after the offense occurred. Defendant Zglobicki was searched at the time and was found to be in possession of a toy revolver which contained live ammunition in the cylinders.

Defendant was taken to the Romeoville Police Station where he was photographed and detained. At the time defendant was being photographed he looked as if he was about to fall asleep with his eyes rolling around. Defendant testified that he had taken some pills and had consumed some wine. There was a quart bottle of wine in the car. When defendant removed the contents of his pockets, he took from his pockets a wallet, a comb and a roll of bills and put them on the table. The wallet had no money in it but the bills which were removed from his pockets were contained in a roll, being in the amount of \$42, \$17 of which were in \$1 bills which matched the description of the kind of money which was taken from the service station operator.

Defendant contends that he was incapable of committing the crime of armed robbery due to his intoxication from either drugs or alcohol. The officers who testified, however, indicated that defendant got out of the automobile immediately upon being told to do so; that he did not need assistance when he got out of the car; and that he put his hands over his head and on top of the car and cooperated with the policemen in carrying out directions. Defendant had also stated to the policemen, "What are you stopping us for? I want to call my mother." Defendant did not have any difficulty in getting in or out of the automobile and needed no assistance to get into the police station. There was nothing unusual about the way defendant walked after he was arrested by the police. When defendant was asked a series of questions with respect to the robbery, he simply replied, "I don't remember." He testified he did not remember anything from the time he got into the automobile with

Carl Lusczak until the time he was stopped by the police officers. He also did not remember any of the statements which he made to the police officers or anything about the hold-up. The jury apparently found this incredible in light of the testimony of other eye-witnesses who saw defendant in the automobile with Lusczak at the time the robbery was committed. It is obvious that the jury did not believe the exculpatory statements of defendant. There was sufficient evidence upon which the jury could find the defendant guilty as a participant in an armed robbery, beyond all reasonable doubt, since he was in the automobile with Lusczak, and even though he did not point the gun at the station attendant. The jury, on the evidence, could conclude that defendant was participating or aiding in the robbery and sharing in the proceeds thereof. We do not believe that such finding of the jury should be set aside on review on the basis of the record before us.

The State agrees with the argument of defendant that the cause should be remanded for the purpose of further proceedings in aggravation and mitigation, and for a new sentencing by the trial court. The State makes clear that it does not agree that defendant's sentence is excessive but believes that a minimum sentence of five (5) years is appropriate in the cause before us. Therefore, under the precedent of People v. Chupich, 53 Ill. App. 2d 573, 295 N.E. 2d 1, we remand this cause to the Circuit Court of Will County for the limited purpose of resentencing under the terms of the new Illinois Code of Corrections, since the minimum term provided for armed robbery is specified to be four (4) years unless the court "having regard to the nature and circumstances of the offense and the history and character of defendant, sets a higher term."

The judgment of conviction is, therefore, affirmed but the sentence heretofore imposed is vacated for the reasons herein set forth and this cause is remanded to the Circuit Court of Will County for the limited purpose of conducting a hearing in aggravation and mitigation and resentencing the defendant in this cause in accordance with the Unified Code of Corrections of the State of Illinois (Ill. Rev. Stat., 1973, ch. 38 §1008-2-4).

Conviction Affirmed.
Remanded for Sentencing.

Scott, P.J. and Dixon, J. concur.

MAR 28 1974

Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

Agenda 73-189

JOSEPH FUHLER, ELDA FUHLER, et al

Mr. JUSTICE CRAVEN delivered the opinion of the court:

This cause is before the court on appeal by the plaintiffs-counterdefendants and on a cross-appeal by defendants-counterplaintiffs. Plaintiffs appeal from an order of the circuit court of Calhoun County dismissing with prejudice their fifth amended complaint and the denial of a "Petition for Establishment of Support and Other Relief" for Charles Nairn. The defendants-counterplaintiffs cross-appeal from this same order which dismissed their second amended counterclaim.

The issues on appeal are whether the plaintiffs' fifth amended complaint and the defendants' second amended counterclaim state a cause of action; and whether the "Petition for Establishment of Support and Other Relief" alleged equitable grounds for relief independent of the relief sought by the fifth amended complaint.

Charles Nairn, Emma Louise Bradley and Maxine Taulman, the plaintiffs and counterdefendants, are income beneficiaries of a testamentary trust created by the will of Robert L. Meyer. George L. Stemmler, defendant and counterdefendant is the trustee of the testamentary trust. Defendants and counterplaintiffs are the residuary beneficiaries under the testamentary trust.

This litigation arose out of a dispute concerning the interpretation and construction of the above-mentioned testamentary trust. Article Fourteen of Robert L. Meyer's will established a trust which was to be funded by the residue of his estate. Paragraph six of Article Fourteen provided that one Minnie Nairn was to be

a life income beneficiary of said trust; and that the trustee should pay certain parts of the net income of the trust estate, that if in his discretion, he determines to be necessary for the maintenance and support, etc., of Minnie Nairn and her son, Charles Nairn. Paragraph seven provided that in the event the net income of the trust estate would be greater than is reasonably necessary to fulfill the purpose enumerated in paragraph six, then the excess should be added to the corpus of the trust estate.

Paragraph eight stated:

"Upon the death of said Minnie Nairn (whether before or after my death), my Trustee shall set apart and hold or continue holding in trust such part of the Trust Estate as in the sole opinion of my Trustee may be found necessary to pay for support and maintenance, in monthly or other convenient installments, out of the net income of such trust, to each said Emma Louise and Maxine Nairn, until each shall have attained the age of forty-five years, sums which in the aggregate shall average not more than One Hundred Dollars (\$100.00) a month for each, and also to pay out of such net income amounts found necessary by my Trustee for the support and maintenance during his life of said Charles Nairn, not exceeding in the aggregate more than an average of One Hundred Dollars (\$100.00) a month." (Emphasis supplied.)

Paragraph nine provided that when Emma Louise and Maxine Nairn (Taulman) attain the age of forty-five, each shall be entitled to receive absolutely free of the trust, their respective pro rata share of one-third "of the then corpus and accumulated interest of such Trust Estate,". Paragraph nine further provided that the remaining one-third of the trust estate shall remain in trust in order to fund the \$100 monthly support payment due Charles Nairn by virtue of paragraph eight, with these payments to run for the duration of his life.

Paragraph thirteen specifies that Joseph Fuhler, Elda Fuhler, Levada Weigel, Elda Stemmler, Hans Jacoby for the use and benefit of Eva Hollander, Gerhart Hollander and Kurt Hollander, were to receive the residue of the trust estate in the event that Minnie Nairn and her three children die before receiving any of the benefits under the trust. Paragraph fourteen specifically states:

"After the death of said Minnie Nairn, and my Trustee set apart and hold in trust such amount as my Trustee may find necessary for the support and maintenance of the three children of Minnie Nairn, all as above set out, and there remain in the Trust Estate an excess over the amount so found necessary by my Trustee, then such excess in the Trust Estate shall thereupon be given free of trust, in equal proportions, to each of the aforesaid seven beneficiaries, or if any then be deceased, to the survivor or survivors of such beneficiaries." (Emphasis supplied.)

Minnie Nairn died intestate on December 26, 1966. Immediately after her demise, the trustee began to administer paragraph eight of the indenture. However, in the course of the administration, disputes arose concerning the interpretation and construction of various paragraphs contained in Article Fourteen of the will. On or about May 4, 1967, the trustee advised the plaintiffs that he did not feel he could make any further expenditures under the trust provision until he received the direction of the court as to his authority and responsibility in the further administration of the estate. On July 26, 1968, this litigation was commenced with the filing of plaintiffs' first complaint. The trustee continued to disperse to each plaintiff the sum of \$100 per month until May 21, 1970, when the defendants-counterplaintiffs filed their first counter-

claim. On September 15, 1970, the trial court dismissed Counts IV and V of plaintiffs' second amended complaint and Counts I through IV and VII of plaintiffs' third amended complaint. The trial court also dismissed the defendant-counterplaintiff's counterclaim. Both plaintiff and defendant appealed from the order. This court, on its own motion, dismissed the appeal for want of a final appealable order.

On July 31, 1972, plaintiffs filed their fifth amended complaint. The defendant George L. Stemmler, in his individual capacity, and in his capacity as trustee, and the remaining defendants-counterplaintiffs filed a motion to dismiss the fifth amended complaint. On September 15, 1972, the defendants-counterplaintiffs filed their second amended counterclaim against plaintiffs and defendant Stemmler as trustee. On September 16, 1972, the plaintiffs filed a "Petition for Establishment of Support and Other Relief". The defendant-trustee filed a motion to strike said petition on October 20, 1972. On November 13, 1972, the circuit court of Calhoun County found that the fifth amended complaint and the defendants-counterplaintiffs' second amended counterclaim failed to state a cause of action; and that the "Petition for Support" stated no grounds for equitable relief. The court dismissed the various complaints and petitions and entered judgment. The plaintiffs and defendants-counterplaintiffs appeal.

The plaintiffs allege in the fifth amended complaint that paragraph fourteen and paragraph eight and nine of Article Fourteen of the will of Robert L. Meyer are inconsistent; consequently, as a result of this patent ambiguity, there is doubt and uncertainty as

to the right and interest of the plaintiffs under the will; therefore, the trust indenture must be subjected to judicial construction and interpretation in order to reconcile these ambiguities. Furthermore, the complaint submitted that construction of Article Fourteen made by the trustee without judicial guidance is clearly contrary and against the testator's intentions and that the distributions of the trust asset made by the trustee in accordance with his interpretation were erroneous and an abuse of discretion.

The defendants-counterplaintiffs' second amended counterclaim seeks to enforce Article Fourteen, paragraph eighteen, an in terrorem clause, against the three plaintiffs on the grounds that plaintiffs' suit is in violation of paragraph eighteen. Paragraph eighteen states:

"Each an(sic) all of the bequests and benefits and appointments in this will given or made is upon the express condition and requirement that each and all of the legatees, beneficiaries and parties herein mentioned shall accept this will and promptly do whatever is necessary to duly probate the same, without in any way seeking or aiding to prevent the due probating of this will, or seeking or aiding to set aside, thwart or contest this will, or any part thereof, and if any such legatee or beneficiary or party mentioned shall seek to hinder or delay the due probating of this will or to set aside or disregard same, or prevent the due carrying out of any provisions of this will, or shall aid in any way, either directly or indirectly, in any such effort to set aside or make void this will or any part thereof, then any such legatee or beneficiary named herein shall, in lieu of the bequests and benefits herein mentioned, receive the sum of One Dollar and no more, and the legacy or benefit herein intended for such person or persons shall lapse and the same shall pass into my residuary estate or into the corpus of the Trust Estate."

The counterclaim prays that since plaintiffs have contravened paragraph eighteen, that they be decreed to take nothing under the will except one dollar each and that the plaintiffs be required to submit an accounting and remit the excess paid to them back to the trust.

The "Petition for Establishment of Support and Other Relief" filed by Charles Nairn through his court-appointed guardian ad litem, Hugh A. Strickland, alleges that when the defendants-counterplaintiffs filed their counterclaim in May of 1970, the trustee under the will terminated the monthly support payments of \$100 to Charles Nairn and that these payments are necessary for his subsistence and welfare. The petition prayed that the trustee be compelled to immediately make disbursement of all past due payments to Charles Nairn or those acting in his behalf, and that the trustee thereafter continue to make such monthly subsistence payments. The petition prayed in the alternative that the trustee be removed from his position as trustee and that all the property under the testamentary trust be turned over to a trustee-successor appointed by the court.

On appeal, plaintiffs submit that paragraph eight of Article Fourteen provides that upon the death of Minnie Nairn, the trustee was to divide the then existing corpus equally between them, to-wit: one-third to Charles Nairn; one-third to Emma Louise Bradley; and one-third to Maxine Taulman. Plaintiffs also contend the provisions found in paragraph eight which require that Emma Louise and Maxine were to receive \$100 per month until they attained the age of forty-five and that Charles was to receive \$100 per month for the rest of his life,

amounted to a spendthrift provision. Furthermore, the plaintiffs submitted that paragraph nine provided that at the age of forty-five, the daughters of Minnie Nairn each shall receive their pro rata one-third share of the entire trust corpus. The remaining one-third would remain in trust for Charles. Likewise, the plaintiffs submit that paragraph fourteen of Article Fourteen is totally repugnant to paragraphs eight and nine, in that paragraph fourteen purportedly requires the trustee to take a portion of the trust not needed to generate the three \$100-a-month support payments and distribute said excesses to seven beneficiaries enumerated in paragraph thirteen. Also, the plaintiffs submit that the trial court must take jurisdiction to hear this case and construe the will since there is a clear doubt or uncertainty as to the rights and interests of the parties as they arise under the will.

Defendants submit that paragraphs eight, nine and fourteen are not in conflict and that their import is clear and certain. Defendants contend that paragraph eight requires that upon the death of Minnie Nairn the trustee is to divide the corpus of the trust into two parts: (1) a portion of the trust shall be set aside in order to generate enough income to pay for support and maintenance of the three plaintiffs at a rate of not more than \$100 per capita a month; (2) the remaining portion of the corpus would then be distributed to the seven beneficiaries named in paragraph thirteen due to the operation of paragraph fourteen. Paragraph nine merely establishes when the plaintiffs Emma Louise and Maxine Taulman would receive the portion of the trust corpus set aside for them. The defendants contend that

since paragraph fourteen and paragraphs eight and nine are not contradictory, the trustee has not misconstrued Article Fourteen and the distribution of the trust assets was not anticipatory nor a gross abuse of discretion; and therefore the fifth amended complaint failed to state a cause of action. The trial court adopted this reasoning.

If the will is not ambiguous, then the trial court properly dismissed plaintiffs' fifth amended complaint for want of jurisdiction. A court can only take jurisdiction to hear and determine complaints to construe wills where there is uncertainty or doubts arising due to an ambiguous portion of a will dealing with the rights and interests of parties arising under such will. (Peck v. Drennan, 411 Ill.31, 103 N.E.2d 63.) A court must refuse jurisdiction of a complaint to construe a will where the will is not ambiguous. (Jusko v. Grigas, 26 Ill.2d 92, 186 N.E.2d 34.) Moreover, a court does not acquire jurisdiction to construe a will simply because a complaint contains allegations contending that certain questions exist requiring construction, if the record shows no such questions in fact exist. Sokol v. Glabman, 4 Ill.App.3d 509, 281 N.E.2d 377.

We have reviewed the particular language in question and conclude that it is not ambiguous. The will requires that at the death of Minnie Nairn the trustee is to set aside a portion of the trust corpus large enough to generate a sufficient amount of income--which is to be not more than \$100 per month for each plaintiff--for the support and maintenance of the plaintiffs. Furthermore, the will unambiguously requires that when the daughters of Minnie Nairn reach

the age of forty-five, they are entitled to one-third of the then corpus that was set aside for them by the trustee at the death of Minnie Nairn, and that Charles Nairn's share would remain in trust the remainder of his life. Therefore, we find that the trial court was without jurisdiction to entertain this matter and properly dismissed plaintiffs' fifth amended complaint.

With regard to defendants-counterplaintiffs' second amended counterclaim, we find that the trial court properly dismissed it on the grounds it did not state a cause of action. The second amended counterclaim alleges that the plaintiffs' conduct in the instant case comes within the proscription of the in terrorem clause found in paragraph eighteen of Article Fourteen of the will in question; thereby vitiating the rights under the will. The defendants-counterplaintiffs submit that the plaintiffs' action herein is conclusive proof that the plaintiffs have failed to accept the will as required by paragraph eighteen and have sought, and are seeking, to set aside and thwart such will.

The plaintiffs counter by arguing that where an action is brought to secure an interpretation of a will, an assertion by any beneficiary of the construction which he believed to be the correct one, is not a contest, for he is merely seeking to give effect to what he believes to be the real intent of the testator. We agree with the plaintiffs' contention. Upon a close reading of paragraph eighteen, one readily sees that the conduct of the plaintiffs herein is not the type of conduct which would trigger the operation of paragraph eighteen. The plaintiffs brought this suit to secure an interpretation of the

will and not to contest or circumvent the will. The trial court properly dismissed the defendants-counterplaintiffs' second amended counterclaim.

As to the last issue of whether the trial court erred in denying plaintiffs' petition for establishment of support for plaintiff Charles Nairn, we find that in light of the above holdings the petition is rendered moot. It is clear that the petitioner Charles Nairn is entitled to all past due payments of \$100 per month, including appropriate interest; therefore, the trial court's finding that the petition for establishment of support stated no grounds for equitable relief independent of the relief sought by the said fifth amended complaint, was correct.

The trial court submitted a memorandum opinion with its original order dismissing the pleadings in this cause. The memorandum opinion clearly elucidated the court's reasoning for its decision. We found that opinion to be most helpful in resolving this controversy and commend such practice.

The judgments of the circuit court of Calhoun County as to the plaintiffs' fifth amended complaint and defendants-counterplaintiffs' second amended complaint are affirmed as is the judgment concerning the Petition for Establishment of Support and Other Relief. The cause is remanded to said court for a hearing to establish the total amount due, including interest, to Charles Nairn.

AFFIRMED AND REMANDED WITH DIRECTIONS.

SMITH, P.J., and SIMKINS, J., concur.

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